

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1960

No. 68

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; AFL-CIO, ET AL., PETITIONERS,

vs.

NATIONAL LABOR RELATIONS BOARD.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

PETITION FOR CERTIORARI FILED APRIL 8, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

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**UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

No. 12,710

NATIONAL LABOR RELATIONS BOARD, Petitioner,

versus

**LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL IN-
DIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA, AFL-CIO; and UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, Respondents.**

**PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL
LABOR RELATIONS BOARD**

Appendix to Petitioner's Brief—Filed August 27, 1959

[fol. 1]

**BEFORE THE
NATIONAL LABOR RELATIONS BOARD
NINTH REGION**

Case No. 35-CB-203

Case No. 35-CB-203-1

In the Matter of

INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL,
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO and LOCAL 60, UNITED BROTHERHOOD
OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, and

MECHANICAL HANDLING SYSTEMS, INCORPORATED,
Party to the Contract,

and

HAFORD B. CARTER, an Individual, ELZA STEVENSON,
an Individual.

Case No. 35-CB-220

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, and

MECHANICAL HANDLING SYSTEMS, INCORPORATED,
Party to the Contract,

and

HAFORD B. CARTER, an Individual.

[fol. 3]

DECISION AND ORDER—December 15, 1958

On January 30, 1958, Trial Examiner Louis Plost issued his Intermediate Report in the above-entitled proceeding, finding that the Respondents, Indianapolis and Central

Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereafter referred to as the Council, and Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereafter referred to as the Local, have engaged in and are engaging in certain unfair labor practices in violation of 8 (b) (1) (A) and 8 (b) (2), and recommending that they cease and desist therefrom and take certain affirmative action as set forth in the copy of the Intermediate Report attached hereto.

He further found that the United Brotherhood of Carpenters and Joiners of America, AFL-CIO, hereafter referred to as the International, had not engaged in any of the unfair practices alleged in the complaint and recommended the dismissal of the complaint in Case No. 35-CB-220.

None of the Respondents filed exceptions. However, the General Counsel filed exceptions, and a supporting brief. On May 9, 1958, the International filed a Motion to Dismiss and a Memorandum in support thereof, to which the General Counsel filed Suggestions in Opposition to Respondent's Motion to Dismiss.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Intermediate Report, the exceptions and briefs, and the entire record in the case, and adopts the findings, conclusions, and recommendations of the Trial Examiner only to the extent consistent herewith.

The Motion to Dismiss, filed by the International, seeks to have the Board dismiss the proceedings insofar as the International is concerned, on the ground that the exceptions filed by the General Counsel on February 21, 1958, were not served on the International "immediately" as prescribed by Section 102.46 of the Board's Rules and Regulations. The order transferring the cases to the NLRB stated that "Exceptions to the Intermediate Report must be received by the Board in Washington, D. C., on or before February 24, 1958."

In acknowledgment of the International's Motion to Dismiss, the Board's Assistant Executive Secretary wrote

McGowan, on May 22, 1958, carbon copy to the International, granting an extension until June 11, 1958, to file exceptions and brief in this proceeding.

The General Counsel asserts in opposition to the Motion to Dismiss that exceptions and a brief in support thereof were mailed to the Board on February 21, 1958, and at the same time copies were served upon each of the parties by duly mailing said copies by certified mail pursuant to Sections 102.46 and 102.89 of the Board's Rules and Regulations. In support thereof, the General Counsel submits [fol. 5] an affidavit that such mailing was made by certified mail; that the certified article number is C-255895; that efforts to trace said certified letter have been unavailing; that no certified return receipt has been received by the General Counsel from the International, but that such receipts have been received from Local 60 and the Council which mailings were made at the same time.

William A. McGowan is the Assistant General Counsel of the International and appeared at the hearing for Local 60 and the Council. Also, he, with Francis X. Ward, the International's General Counsel, appeared at the hearing for the International. Both McGowan and Ward signed the Motion to Dismiss. Undisputed is the fact that both Local 60 and the Council received the exceptions and brief mailed by the General Counsel.

Because of the inability to trace the certified mailing of the exceptions and brief, personal service of such items was obtained on the General Counsel of the International on the 18th day of April, 1958. It is this service which the International contests, contending that such service 51 days after the due date for exceptions does not constitute "immediate" service within the Board's Rules and Regulations.

As urged by the International, the Board's Rules and Regulations, Section 102.46, requires that the parties be served with copies of the exceptions immediately after filing same with the Board. However, Section 102.90 provides that the date of service shall be the day when the matter is deposited in the mail, and that failure to make proof of service does not affect the validity of service.

The General Counsel used an authorized method of service by depositing in the United States mail, duly certified, copies of its exceptions and brief properly ad-

dressed. After failing in its attempt to trace the documents, personal service was made on the General Counsel of the International. Thus it appears that the General Counsel has done all that could be done under the circumstances. Thereafter, the Respondent International was granted adequate additional time to file an answer to the exceptions and brief. It is clear that the exceptions and brief were filed timely on Local 60 and the Council, both [fol. 6] represented by the International's assistant general counsel who also represented the International in these proceedings. The International makes no contention nor showing that it was prejudiced in any manner, and due to the extension of time heretofore granted the International, we find no prejudice nor lack of due process.

Under these circumstances, we deny the International's Motion to Dismiss and find that valid service was made on the International.

The Trial Examiner found that the Respondents, the Council and Local 60, had violated 8 (b) (1) (A) and 8 (b) (2) of the Act. No exceptions were filed by either of the Respondents. Therefore, we adopt the findings of the Trial Examiner, not for the reasons he ascribes, but for the reasons hereinafter stated.

The Trial Examiner found that the International's agreement of May 10, 1956, with the Employer is illegal. But, he found no connection between this agreement and the agreement made later between the Employer and the Respondents, the Council and Local 60. We disagree.

The International's agreement in this case is identical to the agreement involved in the Marley case.¹ As the Board said in that case, it is unrealistic to suggest that the arrangements of the Local and Council at local projects have no relationship to the master agreement between the International and the Employer. We find that the two agreements, one nationwide and with the parent union, and the other, areawide with the Local and Council, dovetailed so precisely so as to reveal a single comprehensive scheme for complete evasion of the statutory ban on all closed shops.

¹ The Marley Company, 117 NLRB 107.

The Respondent International filed no exceptions to the finding that the agreement of May 10, 1956 was illegal. By its terms the Agreement binds the Company to employ members of the Carpenters international. In view of the reference therein to rules and regulations established by the Local of any particular area, the working rules and regulations of the Council and Local 60 were also incorporated [fol. 7] into the contract as if "they had been physically embodied in the document itself." The rules of the Council provide, inter alia, that no member is permitted to work with a member or ex-member who has been suspended or fined until the fine is paid; and, that no member is permitted to work with non-members without permission of the Council. The Constitution of the Council, which also provides working rules, provides for a clearance card committee to examine all clearance cards and recommend their acceptance to the Local; that the finances of the District Council were to be derived, from the sale of working cards and permits, etc.; that the District Council has sole right to issue quarterly working cards to Locals for members "together with such extra cards as may possibly be required in addition thereto, taking a receipt therefrom, and the Local Union shall be held strictly accountable therefor;" for the Council's right to full control over working cards with authority to revoke; that members coming into the district are required to procure working cards before seeking employment; that members of construction (sic) whether following trade actively or not, are required to secure working cards; that carpenters are subject to fine if the working card is not presented to the steward before going to work; and, the requirement of a foreman for every three journeymen—who must be a member in good standing and is charged with the responsibility of enforcing the Trade Rules. We find that working rules which provide such limitations on hiring as do these set out above, together with the contract, are outlawed by statute in that they establish closed shop conditions.

The Trial Examiner found the existence of an oral agreement between Local 60 and the Council and the Employer concerning the employment conditions of employees to be hired, and that they were aware that a denial of a clearance or referral by them would deprive an applicant of

employment in violation of 8 (b) (1) (A) and 8 (b) (2). It is our opinion that such oral agreement between the Employer and Local 60 and the Council was to implement the existing master contract between the Employer and the Respondent International, and was a part of a single comprehensive scheme for complete evasion of the statutory ban on closed shops.

Accordingly, we find that the three Respondents, the International, Council, and Local 60, violated Sections 8 (b) (1) (A) and 8 (b) (2) of the Act in maintaining and enforcing an agreement which established closed shop preferential hiring conditions. Furthermore, we find that by causing or attempting to cause the Company to refuse to hire Elza Stevenson, the Respondents, Council and Local 60, violated 8 (b) (1) (A) and 8 (b) (2); and that the Respondents, International, the Council, and Local 60, by causing or attempting to cause the Company to refuse to hire Hafford B. Carter violated 8 (b) (1) (A) and 8 (b) (2).²

The Remedy

In addition to the Trial Examiner's finding that the Respondents, Local 60 and the Council, have engaged in unfair labor practices, we have found that the International also engaged in the same unfair labor practices. It will be recommended that all the Respondents cease and desist therefrom and take certain affirmative action, designed to effectuate the policies of the Act.

As part of the remedy, therefore, we shall order the Respondents jointly and severally, to make whole Hafford B. Carter,³ and the Respondents, excepting the International, to make whole Elza Stevenson, for any loss of pay they may have suffered as a result of the discrimination against them by payment to each of them a sum of money equal to that which each would normally have earned as

² Elza Stevenson did not file a charge against the International.

³ However, as the Trial Examiner recommended dismissing the complaint filed by Carter against the International, we shall exclude the period from the date of the Intermediate Report to the date of the Order herein in computing the award of back pay for which the Respondent International is responsible.

wages but for the discrimination, less his net earnings during such period, the back pay to be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289.

[fol. 9] Since it has been found that the Respondents have maintained and enforced an unlawful agreement which involves terms and conditions of employment and practices pursuant thereto violative of 8 (b) (1) (A) and 8 (b) (2), it will be ordered that they refrain from maintaining and enforcing its unlawful agreement with Mechanical Handling Systems, Incorporated. Furthermore, since the Board has had before it a similar agreement executed by the Respondents and another employer,⁴ we shall require the Respondents to cease and desist from maintaining and enforcing such agreements; understandings, or practices, not only with Mechanical Handling Systems, Incorporated, but with any other employers, provided that any such employers which are parties to such agreements or arrangements, are employers over which the Board would assert jurisdiction in an appropriate proceeding.

Furthermore, as we find that dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.

In addition therefore, we shall order the Respondents, jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment.⁵ These remedial provisions, we believe, are appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.⁶

⁴ *The Marley Company*, 117 NLRB 107, *supra*.

⁵ Respondents' liability for reimbursement shall include the period beginning six months prior to the filing and service of the initial charge against each Respondent herein and shall extend to all such monies thereafter collected.

⁶ See *Los Angeles-Seattle Motor Express, Incorporated*, 121 NLRB No. 205.

[fol. 10]

ORDER

The Respondents, Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, their officers, representatives, agents, and assigns shall:

(A) Cease and desist from:

(1) Executing, maintaining, performing, or enforcing any agreement, understanding, or practice with Mechanical Handling Systems, Incorporated, or any other employer which requires membership in its organization as a condition of employment, except as authorized by Section 8 (a) (3) of the Act.

(2) Causing and attempting to cause the Employer, Mechanical Handling Systems, Inc., its officers, agents, or assigns, or any other employer, to refuse to hire employees unless they have obtained referral slips from or have been cleared by either of them or to discriminate against the employees in any term or condition of employment, except to the extent permitted by Section 8 (a) (3) of the Act.

(3) In any like or related manner restraining or coercing employees of the Mechanical Handling Systems, Inc., or of any other employer in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement permitted by Section 8 (a) (3) of the Act.

(B) Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(1) Jointly and severally make Hafford B. Carter whole in the manner set forth in "The Remedy" section of this Decision and Order.

(2) Reimburse all employees of Mechanical Handling Systems, Incorporated, in the full amount for all monies illegally exacted from them provided, however, that this Order shall not be construed as requiring reimbursement

for any such dues, non-membership dues, assessments, and work permit fees collected more than 6 months prior to [fol. 11] the date of service of the original charge against each Respondent herein.

(3) Post at their offices in Indianapolis, Indiana, at all locations where notices to members are customarily posted, copies of the notice hereto attached marked "Appendix A." Copies of said notice, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by a representative of the Respondents, Indianapolis and Central, Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, be posted by them immediately upon receipt thereof and conspicuously maintained by them for a period of sixty (60) consecutive days thereafter in all places where notice to members are customarily displayed at International, Council and Local headquarters. Reasonable steps shall be taken by the Respondents to insure that said notices are not altered, defaced, or covered by other material.

(4) Additional copies of the said notice hereto attached marked "Appendix A" shall be signed by a representative of each Respondent and forthwith returned to the Regional Director for the Ninth Region. These notices shall be posted, Mechanical Handling Systems, Incorporated, willing, in places where notices to the employees of Mechanical Handling Systems, Incorporated, are customarily posted.

(5) Notify, in writing, Mechanical Handling Systems, Incorporated, and Hafford B. Carter that the Respondents have withdrawn their objection to the hiring or continued employment of Carter by Mechanical Handling Systems, Incorporated; and also notify Hafford B. Carter, in writing, that henceforth they will not coerce him or restrain

In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be substituted for the words "PURSUANT TO A DECISION AND ORDER" the words "PURSUANT TO A DECREE OF THE UNITED STATES COURT OF APPEALS. ENFORCING AN ORDER."

him by unlawfully denying to him a work referral slip or by otherwise interfering with the rights guaranteed to him by Section 7 of the Act.

[fol. 12] (6) Notify the Regional Director for the Ninth Region, in writing, within ten (10) days from the date of this Order, as to what steps the Respondents have taken to comply herewith.

II. The Respondents Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and the Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, in addition to the above shall:

(1) Jointly and severally make Elza Stevenson whole in the manner set forth in "The Remedy" section of this Decision and Order.

(2) Notify, in writing Mechanical Handling Systems, Incorporated, and Elza Stevenson that the Respondents have withdrawn their objection to the hiring or continued employment of Stevenson by Mechanical Handling Systems, Incorporated; and also notify Elza Stevenson, in writing, that henceforth they will not coerce him or restrain him by unlawfully denying to him a work referral slip or by otherwise interfering with the rights guaranteed to him by Section 7 of the Act.

(3) Notify the Regional Director for the Ninth Region, in writing within ten (10) days from the date of this Order, as to what steps the Respondents have taken to comply herewith.

Dated, Washington, D. C., Dec. 15, 1958.

Boyd Leedom, Chairman, Philip Ray Rodgers, Member, Joseph Alton Jenkins, Member, John H. Fanning, Member, National Labor Relations Board.

(Seal)

[fol. 13]

APPENDIX A TO DECISION AND ORDER

NOTICE

TO ALL MEMBERS OF UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and, LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO,

AND

TO ALL EMPLOYEES OF AND APPLICANTS FOR EMPLOYMENT WITH MECHANICAL HANDLING SYSTEMS, INCORPORATED:

PURSUANT TO
A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, we hereby notify all of you that:

We Will Not, jointly or severally, enter into, perform, maintain, or otherwise give effect to the provisions of any agreement with Mechanical Handling Systems, Incorporated, or any other employer, which requires employees or prospective employees to obtain job referrals or permits, or which unlawfully conditions the hire of applicants for employment or retention of employees in employment by such employer or any other employer, upon clearance or approval by any of us, except as authorized by Section 8 (a) (3) of the Act.

We Will Not, jointly or severally, cause or attempt to cause Mechanical Handling Systems, Incorporated, or any other employer, to discriminate against employees in violation of Section 8 (a) (3) of the Act.

We Will Not, jointly or severally, in any like or related manner restrain or coerce employees or prospective

[fol. 14] employees of Mechanical Handling Systems, Incorporated, or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We, the United Brotherhood of Carpenters and Joiners of America, AFL-CIO; the Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, jointly or severally will make Hafford B. Carter whole for any loss he may have suffered as a result of the discrimination practiced against him in his failure to obtain employment from Mechanical Handling Systems, Incorporated, by our refusal to issue a clearance or work permit to him.

We, the Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, jointly or severally will make Elza Stevenson whole for any loss he may have suffered as a result of the discrimination practiced against him in his failure to obtain employment from Mechanical Handling Systems, Incorporated, by our refusal to issue a clearance or work permit to him.

We Will notify, in writing, Mechanical Handling Systems, Incorporated, and Hafford B. Carter that we have withdrawn our objection to the hiring or continued employment of Hafford B. Carter, and that henceforth we will not coerce or restrain him by discriminatorily denying to him a clearance or a work referral slip or by otherwise interfering with his rights in Section 7 of the Act.

We, excepting herefrom the Respondent International, will notify in writing, Mechanical Handling Systems, [fol. 15] Incorporated, and Elza Stevenson that we have

¹ Elza Stevenson did not file a charge against the International.

withdrawn our objection the hiring or continued employment of Elza Stevenson, and that henceforth we will not coerce or restrain him by discriminatorily denying to him a clearance or a work referral slip or by otherwise interfering with his rights in Section 7 of the Act.

We Will reimburse all employees of Mechanical Handling Systems, Incorporated for all dues, non-membership dues, assessments and work permit fees, which we have collected pursuant to our unlawful agreement with the aforementioned Company beginning with all such dues, non-membership dues, assessments, and work permit fees, collected six months prior to the filing to the initial charge against each Respondent.

Signed copies of this notice have been mailed to the National Labor Relations Board's Regional Director for the Ninth Region for posting by Mechanical Handling Systems, Incorporated, that company willing, in all locations where notice to employees of Mechanical Handling Systems, Incorporated, are customarily posted.

United Brotherhood of Carpenters
and Joiners of America, AFL-CIO

Dated By
(Representative) (Title)

Indianapolis and Central Indiana
District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

Dated By
(Representative) (Title)

Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof and must not be altered, defaced, or covered by any other material.

[fol. 16]

BEFORE NATIONAL LABOR RELATIONS BOARD

INTERMEDIATE REPORT—January 30, 1958

Statement of the Case

Upon a charge filed on behalf of H. B. Carter with the 35th Subregion of Region 9 of the National Labor Relations Board (Board) on March 19, 1957, and thereafter amended July 31, 1957, and September 10, 1957, by First and Second Amended Charges duly filed, all docketed as 35-CB-203, and on a Charge likewise filed March 19, 1957, on behalf of Elza Stevenson and docketed 35-CB-203-1 and on a Charge filed with said Subregion on September 10, 1957, on behalf of Hafford B. Carter, amended October 7, 1957, by a First Amended Charge, docketed as 35-CB-220, all said charges alleging that (a) Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and (b) Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and (c) United Brotherhood of Carpenters and Joiners of America, AFL-CIO (collectively herein called the Respondents, and severally herein called Respondent Council, Respondent Local 60 and Respondent International), respectively, engaged in certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 61 Stat. 136, hereinafter called the Act, the General Counsel of the National Labor Relations Board, on October 8, 1957, on behalf of the Board, by the Regional Director for the Ninth Region, on October 8, 1957, issued a Consolidated Complaint against the Respondents alleging that the Respondents had engaged in and were engaging in unfair labor practices within the meaning of Section 8 (b) (1) (A) and (2) and Section 2 (6) and (7) of the Act.

With respect to the unfair labor practices, the complaint alleged in substance that (1) on or about May 10, 1956, Respondent International and Mechanical Handling Systems, Incorporated, herein called Party to the Contract, or Mechanical Handling, entered into an illegal closed shop agreement, that (2) on or about January 9, 1957, the Respondent Council adopted and enforced the agreement

above mentioned, that (3) the Respondents Council and [fol. 17] Local 60 adopted the illegal contract aforesaid and have enforced said agreement as to Mechanical Handling, required Mechanical Handling to illegally hire only members of Respondents or others approved by them, that (4) on or about February 6, 1957, the Respondents, Council and Local 60, caused Mechanical Handling to refuse employment to certain individuals not approved for employment by the Respondents, and further that (5) pursuant to the terms of the illegal agreement above mentioned the Respondents have exacted dues from "unknown employees" of Mechanical Handling "in amounts unknown to the Regional Director."

The Respondents duly filed answers denying that they had engaged in any of the unfair labor practices alleged.

Copies of the Complaint, the Charges, and a Notice of Hearing were duly served on the Respondents, the Charging Parties and the Party to the Contract.

Pursuant to notice a hearing was held at Indianapolis, Indiana, November 25 and 26, 1957, before Louis Plost, the undersigned Trial Examiner.

All the parties were represented their representatives being herein referred to in the names of their principals. All the parties were afforded full opportunity to be heard, to examine and cross-examine witnesses, to introduce evidence bearing upon the issues, to argue orally and to file briefs, proposed findings of fact and/or conclusions of law, with the undersigned.¹ The parties waived oral argument. A brief has been received from the General Counsel.

Upon the entire record and from his observation of the witnesses, the undersigned makes the following:

FINDINGS OF FACT

I. The business of the Company Party to the Contract

Mechanical Handling Systems, Incorporated, is a Michigan corporation engaged in the manufacture, design, and installation of conveyors and allied equipment and at all

¹ The time for filing briefs was extended by the Chief Trial Examiner to December 26.

[fol. 18] times material herein was engaged in such operations at the Ford Motor Company plant in the City of Indianapolis, Indiana.

During the calendar year 1956, which is a representative period, Mechanical Handling sold and shipped, from its plants located in Detroit, Michigan and Van Dyke, Michigan, directly to points located outside the State of Michigan, products of a value in excess of \$1,000,000.00.

It is conceded that now and at all times material to the issues herein, Mechanical Handling is and has been an employer engaged in "commerce" or in "operations affecting commerce" as those terms are defined in Section 2 (6) and (7) of the Act.

II. The Respondent Labor Organizations

The Respondents admit the allegation set forth in the Consolidated Complaint that each of them, are, and have been at all times material to the issues herein labor organizations as defined in Section 2 (5) of the Act.

III. The unfair labor practices

Sherman P. Roberts field superintendent of Mechanical Handling at its Indianapolis project, affected by this proceeding, testified that Mechanical Handling was party to an agreement with the Respondent International. This agreement is dated May 10, 1956, and provides:

We, the firm of Mechanical Handling Systems, Inc., Agree to recognize the jurisdiction claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners.

The agreement is attached hereto as "Appendix A", as a part of this report.

[fol. 19] There can be no doubt that the agreement between Mechanical Handling and the Respondent Interna-

tional attempts to set up an illegal closed shop and an equally illegal-preferential hiring system.²

Roberts further testified that Mechanical Handling is also party to a collective bargaining contract with Millwrights Local 1102 of Detroit, Michigan, affiliated with the Respondent International and that:

Well, whenever we go out of town, wherever we go we work under the same agreement, you see. We work under the same agreement out of town as we do in.

However according to Roberts the jurisdiction of Local 1102 does not extend into Indiana.

Field Superintendent Roberts further testified that on January 4, 1957, Mechanical Handling started a certain job at the Ford Motor Company's plant in Indianapolis, he being in charge; that "two or three days" later Ralph R. Smith business representative of the Respondent Council and the business agent for the Iron Workers Union called on him at the Ford job, this being the first time he had ever met Smith; that the two business agents conferred in his presence; that he did not participate in the conversation but "let them do their own talking, make their own decisions" because:

Mr. Smith and the business agent for the Steelworkers was deciding who was going to have the jurisdiction of putting the trough sections in the floor.

That during Smith's initial visit he told Smith "we wanted millwrights" and "we got four or five millwrights the next day."

According to Roberts during this first conversation he agreed with Smith on a procedure to be followed thereafter by which millwrights and carpenters would be hired through Respondent Local 60, the arrangement being:

[fol. 20] Well, the men of Local 60, Mr. Bereman, or whoever issues this referral card, then it is addressed to Roberts or whoever it is on the job of Mechanical Handling Systems.

² J. J. White, Inc., 111 NLRB 1126.

That on the Ford job no carpenters or millwrights were hired who were not referred to him by the Respondent Local 60, a referral slip being required of every applicant before he was hired.

Roberts testified that at no time during his first conversation with Smith or in any subsequent conversation was the matter of Mechanical Handling's agreement with the Respondent International discussed.

Ralph R. Smith testified that during all times material herein he was president of Respondent Council as well as its business agent and further that he was and is the only person who "can make an agreement officially" for Respondent Council and Respondent Local 60.

Respondent District Council is "composed of regularly elected delegates" from various local unions "in Indianapolis and vicinity."

Respondent Local 60 is a conventional craft union affiliated with Respondent International and has delegate representation in Respondent Council.

It is clear that Smith in his capacity of representative of Respondent Council entered into contracts through the Council for and in behalf of Respondent Local 60.

Smith further testified:

Q. (By Mr. McGowan) Let me ask you this Mr. Smith: In connection with the relationship between any particular contractor and the District Council, where you have an agreement in effect, is your relationship controlled by your bylaws?

A. Our relationship is controlled by the agreement we have with the Contractors Association.

Logically this means that the relationship of Respondent Local 60 and employers contracting through Respondent Council is also controlled by the same agreement.

[fol. 21] Business Representative Smith corroborated Roberts' testimony that the agreement existing between Mechanical Handling and Respondent Local was not discussed between them, however, in an affidavit Smith made for the General Counsel's field examiner Smith averred that in his first meeting with Roberts "he (Roberts) advised me

that his company had an International Agreement with our Union and that he would abide by its terms."

This language does not, in the opinion of the undersigned, spell out a discussion, or adoption of an existing contract by the parties.

With respect to his first meeting with Roberts, the Business Representative testified:

At that time I gave him a copy of the contract that we had with the General Contractors Association, which we asked that he work under.

The record is clear that the document given to Roberts at the time was a copy of "Joint Agreement by and between Building Contractors Association and Indianapolis and Central Indiana District Council."³

According to Smith:

I gave Mr. Roberts the agreement, and I said, "We live by this 100 per cent. What is in it we will do. That's our agreement with you."

Smith testified that although he and Roberts acting for their principals signed no written agreement they entered into a binding verbal contract which carried union shop provisions, the oral contract being Mechanical Handling's agreement to abide by the terms of the Respondent's (Council and Local 60) agreement with the Building Contractors Association.

Smith testified that at the time the agreement was entered into Mechanical Handling had hired no employees for the Ford job in Indianapolis and had only one employee (other than Roberts) at Indianapolis, a foreman brought [fol. 22] from Detroit, who was a member of a Detroit Michigan local.

Smith testified:

The Witness: I believe that they had one man from 1102 in Detroit, was on the job.

Trial Examiner: Just one. But anyone from your jurisdiction here on the job?

³ Respondent's Exhibit No. 1.

The Witness: No. He hadn't hired anybody.

Trial Examiner: He hadn't hired anyone. And at that time when he had not hired and merely had here a man from Detroit who was a member of the craft, he made an agreement with you to abide by the local contract?

The Witness: Yes.

The record discloses that not only did Mechanical Handling agree to abide by the Respondents' (Council and Local 60) contract with the Indianapolis Building Contractors Association but it did adhere to the closed shop conditions imposed on it by the Respondent Council and Respondent Local 60.

Hafford B. Carter corroborated by Elza Stevenson testified he had been employed for a two and one half year period by Mechanical Handling on a job at Louisville, Kentucky; that on advice of his foreman he came to Indianapolis, together with Elza Stevenson, to seek employment from Roberts on the Ford job there; that late in January 1957, he and Stevenson called on Roberts at the Ford job and asked Roberts for employment. Carter testified:

As near as I can remember, sir, he (Roberts) said that he would like to have me especially as I had worked for him before, on the job, it was just beginning, but he felt like that I would have an awful lot of trouble getting through the local and getting a clearance card to go to work; and for me to go back down to the local and wait until someone came in to see as to whether or not I could get clearance.

[fol. 23] According to Carter, he was also told by Roberts that the job had not yet started because of lack of materials; that he and Stevenson then went to the District Council's office, where they asked for referrals to the Ford job but after the person they talked to telephoned Roberts, (Carter listening on a connecting phone) and Roberts stating he would have work for them the following week, they left without being given referrals and returned to Louisville; that on February 5, 1957, Carter telephoned Roberts and:

He told me to come over the next day and get Mr. Stevenson, that he had plenty of work and would definitely like to have us go to work at that time.

That on the next day he and Stevenson called on Roberts at the job talked to Roberts and Ernest A. Wallace, the general foreman under Roberts and that:

He (Roberts) and Mr. Wallace said that we were still going to have trouble trying to get through the union, and didn't know as to whether or not we would, but he was going to give it a try. And Mr. Wallace recommended that he give us a letter of recommendation, and Mr. Roberts said, "Well, that will be all right. Go ahead and write it up and I will sign it."

The following letter was given Carter:

Dear Mr. R. R. Smith,

I would like to request that these two men, Elza W. Stevenson and H. B. Carter be given a working permit for this job; these men have worked for Mechanical Handling Systems on several occasions. They are both good conveyor men. I would appreciate your cooperation in this matter.

Yours very truly,

(s) S. P. Roberts

Mr. S. P. Roberts

Gen. Field Supt.

Mechanical Handling Systems

[fol. 24] Carter and Stevenson then went to the office of Respondent Council, showed the letter to Smith, and asked him for referrals to the Ford Job. Smith refused them referrals until he had "investigated"; told them to return the next day which they did, Smith then refused to refer them to the job for work.

After Smith's refusal the two men called at the office of the Respondent International and were there told they could not get referrals for work until cleared by the Respondent Local 60.

Stevenson who corroborated Carter testified that after being refused referrals to the Ford job he so informed Foreman Wallace. Stevenson testified:

Q. And will you tell us about that conversation?

A. Well, I told him what had happened, that we hadn't been able to get a permit or wasn't able to go to work for him the next morning—that morning and all. And he asked if we would try to come back and we told him that we might the following week. He said if we come back to get hold of another fellow down there, Tommy Craig, and get him to come back and have him to clear in at the same time that we were supposed to clear in.

Q. And do you recall whether or not he said anything about your being employed?

A. Yes. We had a job if we come back.

Superintendent Roberts testified that he told Carter and Stevenson "that they would first have to clear through the Carpenter's union" and that he issued the letter above referred to.

Wallace testified with respect to the letter:

What I recollect was—I don't know who specifically asked for it. I didn't pay too much attention, but I do know, in fact, I dictated the letter.

[fol. 25]

CONCLUSION

On the above recited facts the complaint alleges violation of Section 8 (b) (1) (A) and (2) of the Act by the three Respondents, jointly and severally.

This section reads:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: • • •

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of Sub-section (a) (3) • • •

The undersigned has found that the agreement entered into May 10, 1956, between Mechanical Handling and Respondent International is illegal, however the undersigned is not persuaded that except by the most irresponsible inference can this record be thought to show any connection between this illegal agreement and the agreement later made by Mechanical Handling and Respondents Council and Local 60.

The mere existence of an illegal contract between two parties does not warrant findings and recommendations on it merely because one of the parties to it has executed a different agreement with different parties also alleged to be illegal and the basis of an unfair labor practice complaint. The undersigned is not persuaded that the theory of the overt act may be scrapped in order to extend the scope of an unfair labor practice charge.

The undersigned will therefore recommend that the complaint as to Respondent International, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (Case No. 35-CB-220) be dismissed.

The theory of the General Counsel is that the unfair labor practice herein is grounded upon the illegal contract between Mechanical Handling and Respondent International adopted by Respondents Council and Local 60. In rejecting this theory the undersigned does not consider [fol. 26] that the case falls because it cannot be sustained as alleged, for the reason that all acts and conduct of the Respondents Council and Local 60 were fully litigated in the hearing.

The undersigned will base his findings on such facts as revealed in the litigation.

Upon the entire record the undersigned finds that at the time of their first meeting in January 1957, before Mechanical Handling had hired any employees for its Ford job at Indianapolis, Smith acting for the Respondent Council and Local 60 jointly and Roberts acting for Mechanical Handling entered into an oral agreement covering the employment conditions of certain classes of labor to be hired by Mechanical Handling for its Ford job.

It is clear, and the undersigned finds, that the agreement was the joint and several agreement of both the Respondents aforesaid.

It is also clear that in implementing the agreement Mechanical Handling hired through both Council and Local 60 and that both Council and Local 60 referred and cleared applicants to Mechanical Handling for the Ford job.

By demanding of and entering into this agreement with Mechanical Handling at a time when Mechanical Handling had no employees on the job, and binding the employment rights of prospective applicants the Respondent Council and Respondent Local 60 engaged in conduct violative of Section 8 (b) (2) of the Act.⁴

At the time the agreement was made it is clear that the Respondents, Council and Local 60, knew as a practical matter if they refused to issue clearance or a referral to an applicant he would not be hired by Mechanical Handling, thus they arranged to deprive such applicants of the right of employment. At the time they refused referrals to Carter and Stevenson, after Mechanical Handling had indicated it would employ them the Respondents, Council and Local 60, clearly violated Section 8 (b) (1) (A) and (2) of the Act.⁵

[fol. 27] The complaint alleges:

Now and at all times since on or about January 9, 1957, pursuant to said contractual provisions and the illegal hiring practice above alleged, the Respondents have regularly exacted and collected from all of the employees of Mechanical Handling Systems, Incorporated and of other employers within said territorial jurisdiction, whose names are unknown to the Regional Director, dues, non-membership dues, assessments, and work-permit fees, the exact amounts of which said exactions and collections are unknown to the Regional Director.

The General Counsel argues in his brief that such collections be ordered refunded and "any specific person who

⁴ N. L. R. B. v. Local 218, 218 F. 2d 226 (C. A. 10); N. L. R. B. v. Philadelphia Iron Works, 211 F. 2d 937 (C. A. 3); Radio Officers Union v. N. L. R. B., 37 U. S. 17.

⁵ Footnote No. 2, J. J. White, Inc., 111 NLRB 1126.

has been discriminated against pursuant to such practice" be made whole.

Again, other than the bare allegation in the complaint there is nothing in the record in the way of proof or even statement with respect to the unfair labor practice so charged, no named individuals suffering thereby, no named individuals who enforced the alleged unlawful provisions for the Respondents or took part in maintaining the alleged closed shop provision by "check off" or otherwise on behalf of the Respondents by Mechanical Handling.

The undersigned sees no merit in an allegation not founded on a charge, not in any way proven but treated merely as a shot gun blast aimed in general direction of quarry hoping that game will be brought down.*

Concluding Findings

The undersigned finds that by entering into and maintaining the oral illegal agreement, hereinabove referred to and by generally issuing and refusing to issue permits to work under the said agreement and by refusing to issue a referral to the Mechanical Handling job at the Ford job in Indianapolis to Carter and Stevenson, the Respond- [fol. 28] ents (Council and Local 60) have engaged in and are engaging in conduct violative of the Act, more particularly Section 8 (b) (1) (A) and (2) thereof.

IV. The effect of the unfair labor practice upon commerce

The activities of the Respondents, Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, in connection with the operations of Mechanical Handling Systems, Incorporated, Party to the Contract, occurring in connection with operations described in Section I, above, have a close, intimate, and substantial relation to trade, traffic, and commerce among the several

* In passing the undersigned points out that had a charge been filed, and a proper complaint issued Mechanical Handling might well have been a proper party to the unfair labor practices herein.

States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Since it has been found that the Respondents (Council and Local 60) have engaged in unfair labor practices, it will be recommended that each of them cease and desist therefrom and take certain affirmative action, designed to effectuate the policies of the Act.

Since it has been found that the Respondents (Council and Local 60) have maintained and enforced an oral agreement understanding and practice which contains and involves terms and conditions of employment and practices which are violative of Section 8 (b) (1) (A) and (2) of the Act, it will be recommended that they cease and desist from giving effect to the unlawful provisions of said oral agreement and understanding. Since it has been found that on February 6, 1957, pursuant to said oral contractual provisions and illegal hiring practices, the Respondent Council and the Respondent Local 60 by and through their agent Ralph R. Smith, attempted to cause and caused Mechanical Handling to discriminatorily refuse employment to Hafford B. Carter and Elza W. Stevenson because said labor organizations refused clearance for employment to Hafford Carter and Stevenson thereby causing said Carter and [fol. 29] Stevenson to lose employment and incur losses it will therefore be recommended that the Respondents aforesaid make them whole for any loss of pay they may have suffered as a result of the discrimination against them by payment to each of them of a sum of money equal to that which each would normally have earned as wages but for the discrimination, less his net earnings during such period, the back pay to be computed in the manner prescribed by the Board in F. W. Woolworth Company, 90 NLRB 289.

Upon the basis of the foregoing findings of fact and upon the record as a whole, the undersigned makes the following:

Conclusions of Law

1. Mechanical Handling Systems, Incorporated, is engaged in commerce within the meaning of Section 2 (6) and (7) of the Act.

2. Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO and Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, are labor organizations within the meaning of the Act.

3. By enforcing and maintaining an oral agreement and/or understanding and practice with Mechanical Handling Systems, Incorporated which contains and involves terms and conditions of employment requiring clearance or referral of certain applicants of employment by the labor organizations aforesaid before their employment by Mechanical Handling Systems, Incorporated the said Respondent labor organizations have engaged in and are engaging in unfair labor practices within the meaning of Section 8 (b) (2) of the Act.

4. By interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act, the said Respondents have engaged in unfair labor practices within the meaning of Section 8 (b) (1) (A) of the Act.

5. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

[fol. 30] The Respondents have not engaged in any unfair labor practices alleged in the complaint other than those specifically found herein.

The Respondent named in case No. 35-CB-220, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, has not engaged in any of the unfair labor practices alleged in the complaint.

RECOMMENDATIONS

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that the Respondents, Council and Local 60,

1. Cease and desist from:

(a) Maintaining and enforcing current agreements, understandings and practices with Mechanical Handling

Systems, Incorporated which contain and involve terms and conditions of employment requiring illegal referral of applicants for employment by Mechanical Handling by the Respondents aforesaid or maintaining or entering into any renewal thereof, or any superseding agreements, understandings and practices containing union-security provisions, except as authorized by the proviso to Section 8 (a) (3) of the Act;

(b) Requiring employees or applicants for employment to obtain clearance or job referrals from the Respondents, Council and/or Local 60, as a condition of employment, except under a nondiscriminatory arrangement permitted by Section 8 (a) (3) of the Act;

(c) In any like or related manner interfering with restraining or coercing employees or applicants for employment, in the exercise of their right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, to engage in concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain therefrom, except to the extent that such rights may be affected by an agreement requiring membership in a labor [fol. 31] organization as a condition of employment, as authorized in Section 8 (a) (3) of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(1) Jointly and severally make whole Hafford B. Carter and Elza Stevenson for any loss they may have suffered for the discrimination found to have been practiced against them as set forth in Section "The Remedy."

(2) Cease and desist from any attempt to cause or attempt to cause Mechanical Handling to engage in the practice of requiring employees to obtain clearance or job referrals as a condition of employment, except under a nondiscriminatory arrangement permitted by Section 8 (a) (3) of the Act;

(3) Post at their main offices and union halls at Indianapolis, Indiana, copies of the notice attached hereto and

marked Appendix "B" and "C" by and for Respondent Council and "C" by and for Respondent Local 60. Copies of said notices, to be furnished by the Regional Director for the Ninth Region, shall, after being duly signed by the proper representatives, of the proper Respondent, be posted by it immediately upon the receipt thereof, and maintained by it for sixty (60) consecutive days thereafter, in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by the said Respondents to insure that such notices are not altered, defaced, or covered by other materials.

In order that the members of Local 60, any nonmembers seeking employment on jobs where such members are employed as well as employers, may be fully assured that Respondents Local 60 and District Council do not intend to engage in the conduct herein found to be illegal, obviously the posting of a notice on a Union hall bulletin board is not sufficient, therefore the undersigned will recommend wider publication. Under all the circumstances in this case the undersigned believes it proper to recommend, and does recommend, that any notice ordered posted by the Respondents be also ordered simultaneously published by each of them in a daily newspaper of general circulation in Indianapolis, Indiana. The selection of such a paper should be confined to a daily newspaper of general circulation and not made from papers serving specialized groups of readers such as legal news publications, shoppers news, trade papers, labor publications or foreign language papers.

(4) It is further recommended that the Respondents Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, and Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO mail to the Regional Director for the Ninth Region signed copies of the notices attached to the Intermediate Report as "Appendix B" and "C" for posting, Mechanical Handling Systems, Incorporated willing, at its Ford Motor Co., job in Indianapolis, in places where notices to employees of Mechanical Handling are customarily posted;

(5) Notify the Regional Director for the Ninth Region in writing within twenty (20) days from the date of this order what steps it has taken to comply herewith.

It is recommended that the complaint be dismissed as to United Brotherhood of Carpenters and Joiners of America, AFL-CIO. (Case No. 35-CB-220)

It is further recommended that the complaint be dismissed insofar as it alleges any unfair labor practice not specifically found in this report.

It is further recommended that unless each of the Respondents (Council and Local 60) within twenty (20) days from the receipt of this Intermediate Report shall notify the said Regional Director in writing that they will comply with the foregoing recommendations, the National Labor Relations Board issue an order requiring the Respondents to take the aforesaid action.

Dated at Washington, D. C., this 30th day of January 1958.

(s) Louis Plost
Trial Examiner

[fol. 33]

APPENDIX A TO INTERMEDIATE REPORT

International Agreement

Memorandum of Agreement between the firm of Mechanical Handling Systems, Inc., 4600 Nancy Ave., Detroit 12, Michigan, and the United Brotherhood of Carpenters and Joiners of America.

We, the firm of Mechanical Handling Systems, Inc., Agree to recognize the jurisdiction claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners.

No change to be made in the hours and wages in any locality, and no conditions imposed other than are enforced on all Local firms.

In consideration of the foregoing, the United Brotherhood of Carpenters and Joiners of America agree that no stoppage of work or any strike of its members, either collectively or individually, shall be entered into pending any dispute being investigated and all peaceable means taken to bring about a settlement.

Mechanical Handling Systems, Inc.
(s) Ralph Gray
Asst. Director of Manufacturing

For the United Brotherhood of Carpenters and Joiners of America

(s) M. A. Hutcheson
General President

Dated 10 May 1956.

[fol. 34]

APPENDIX B TO INTERMEDIATE REPORT

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER
of the National Labor Relations Board, and in order to effectuate the policies of the Labor Management Relations Act, we hereby notify our ~~members~~ and whoever it may concern that:

We Will Not enter into, maintain or enforce any contract, agreement, understanding, or practice, with Mechanical Handling Systems, Incorporated which requires employees or prospective employees to obtain job referrals or permits from us as a condition of obtaining employment, except to the extent permitted under the proviso of Section 8 (a) (3) of the Act.

We Will Not cause or attempt to cause Mechanical Handling Systems, Incorporated or any other employer,

to discriminate against employees in violation of Section 8 (a) (3) of the Act.

We Will Not in any like or related manner restrain or coerce employees or prospective employees of Mechanical Handling Systems, Incorporated or any other employer, in the exercise of the rights guaranteed in Section 7 of the Act, except to the extent that such rights may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized by Section 8 (a) (3) of the Act.

We Will notify, in writing, Mechanical Handling Systems, Incorporated employer, Hafford B. Carter and Elza Stevenson applicants for employment, that we have no objection to their employment by Mechanical Handling Systems, Incorporated.

We, will make whole the above-named employees for any losses suffered by them as a result of the discrimination [fol. 35] practiced against them in connection with their applications for employment by Mechanical Handling Systems, Incorporated caused by our refusal to issue clearance or work permits to said Carter and Stevenson.

Indianapolis and Central Indiana
District Council, United Brotherhood
of Carpenters and Joiners
of America, AFL-CIO

(Labor Organization)

Dated By
(Representative) (Title)

This notice must remain posted for 60 days from the date hereof, and must not be altered, defaced, or covered by any other material.

APPENDIX C TO INTERMEDIATE REPORT

NOTICE TO ALL EMPLOYEES

PURSUANT TO
THE RECOMMENDATIONS OF A TRIAL EXAMINER
of the National Labor Relations Board, and in order to
effectuate the policies of the Labor Management Relations
Act, we hereby notify our members and whoever it may
concern that:

We Will Not cause or attempt to cause Mechanical
Handling Systems, Incorporated to require employees
or applicants for employment to obtain job referrals
or permits from us, as a condition of employment,
except under a nondiscriminatory arrangement per-
mitted by Section 8 (a) (3) of the Act.

We Will Not enter into, maintain or enforce any con-
tract, agreement, understanding, or practice, with Me-
chanical Handling Systems, Incorporated, or any other
employer, which requires employees or prospective em-
ployees to obtain job referrals or permits from us as
a condition of obtaining employment except to the ex-
[fol. 36] tent permitted under the proviso of Section
8 (a) (3) of the Act.

We Will make whole the following named employees
of Mechanical Handling Systems, Incorporated for any
losses suffered by them as a result of the discrimination
practiced against them in their failure to obtain em-
ployment from Mechanical Handling Systems, Incorpo-
rated caused by our refusal to issue clearance or work
permits to them.

Hafford B. Carter
Elza Stevenson

We Will Not in any other manner interfere with, re-
strain or coerce employees of Mechanical Handling
Systems, Incorporated or employees of any employer
in the exercise of the rights guaranteed in Section 7
of the Act, except to the extent that such rights may

~~be affected by an agreement requiring membership in~~
a labor organization as a condition of employment, as
 authorized by Section 8 (a) (3) of the Act.

Local 60, United Brotherhood of
 Carpenters and Joiners of Amer-
 ica, AFL-CIO
 (Labor Organization)

Dated By
 (Representative) (Title)

This notice must remain posted for 60 days from the
 date hereof, and must not be altered, defaced, or covered
 by any other material.

[fol. 37]

BEFORE THE NATIONAL LABOR RELATIONS BOARD
 NINTH REGION

[Title omitted]

Transcript of Testimony

Room 266, Post Office Building,
 Indianapolis, Indiana
 Monday, November 25, 1957

Pursuant to notice, the above-entitled matter came on
 for hearing at 1:30 p.m.

[fol. 38] Before:

Louis Plost, Esq., Trial Examiner.

APPEARANCES:

Francis X. Ward, Esq., 222 East Michigan Street,
 Indianapolis, Indiana, for United Brotherhood of
 Carpenters & Joiners of America; and

William A. McGowan, Esq., 222 East Michigan Street,
 Indianapolis, Indiana, for Indianapolis & Central
 Indiana District Council and Local Union No. 60.

A. D. Ruegsegger, Esq., of Dyer, Meek, Ruegsegger & Bullard, 2100 Dime Building, Detroit 26, Michigan, for Mechanical Handling Systems, Inc.

John H. Rogers, Esq., 319 North Pennsylvania Street, Indianapolis, Indiana, appearing for the General Counsel.

George J. Long, Esq., 515 Marion E. Taylor Building, Louisville, Kentucky, appearing for Hafford Carter and Elza Stevenson, Individuals.

Proceedings

(Thereupon, the documents previously marked General Counsel's Exhibits Nos. 1-A through 1-S, 1-U through 1-V for identification were received in evidence.)

(Thereupon, the document previously marked General Counsel's Exhibit No. 2 for identification was received in evidence.)

Trial Examiner: I will ask the counsel for the party to the contract if it is conceded by the Mechanical Handling Systems, Incorporated, that the Company is in commerce within the meaning of the Act.

Mr. Ruegsegger: It is so conceded.

[fol. 39] SHERMAN P. ROBERTS, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. By whom are you employed?

A. Mechanical Handling Systems.

Q. In what position are you employed?

A. I am a field superintendent.

Q. What are your duties as field superintendent?

A. To check the jobs, supervise the direction of the jobs in different territories.

By Mr. Rogers:

Q. Mr. Roberts, will you state for the record what your job was the month of January, 1957?

A. 1957? I was out to the Ford plant in Indianapolis as a field superintendent.

Q. I see. And will you state for the record, if you recall, when that job at the Ford Motor Company started?

A. On the 4th day of January.

Q. Of what year?

A. Fifty-seven.

Q. Who is Ralph Smith?

A. Business agent for the District Council, sitting back here.

Q. And when you refer to the District Council, what do you mean?

A. Well, I have always went, when we come into town we go to a local to get our men, and Mr. Smith is the man I contacted.

Q. Will you state whether or not you have reference to a labor organization when you—

A. A labor organization; that's right.

Q. What labor organization?

A. The A. F. of L.

Q. Can you tell us whether or not that labor organization [fol. 40] to which you have reference has any connection with the Carpenters?

A. It does.

Q. What is that connection, if you know?

A. The Carpenters and the Joiners.

By Mr. Rogers:

Q. Who is Mr. Bereman?

A. Mr. Bereman is right over there.

Q. Do you know what—

A. He's with Local 60, Carpenters and Joiners.

Q. Now, state for the record whether or not prior to the start of the job at the Ford plant by Mechanical Handling Systems you had an occasion to talk to Mr. Smith?

A. No, sir.

Q. Will you tell us whether or not immediately following the start of that job you had occasion to talk to him?

A. About two days, two to three days I would say. Wouldn't you, Ralph?

Q. Where did you have occasion to talk to Mr. Smith?

A. In the Ford Motor plant out there.

Trial Examiner: Keep your voice up, please Mr. Roberts.

By Mr. Rogers:

Q. Was anyone else present at that time?

A. Well, I had a man by the name of Verkler out there at that time; and Smith, and the business agent for the Iron Workers, and Larry Verkler.

Trial Examiner: And you don't know the name of the business agent for the Iron Workers?

The Witness: What is the—

Trial Examiner: Never mind. It isn't necessary.

By Mr. Rogers:

Q. Will you state for the record what, if anything, was said during that conversation?

A. The only thing we had any reference to at that time, starting that job, we was deciding who was going to put the troughs in the floor, see.

[fol. 41] Q. Will you state whether or not you recall anything else that was said at that time?

A. No, sir.

Trial Examiner: Who was deciding who was to do this work?

The Witness: Mr. Smith and the business agent for the Steelworkers was deciding who was going to have the jurisdiction of putting the trough sections in the floor.

Trial Examiner: Were you present while the—

The Witness: No. I let them do their own talking, make their own decisions.

Trial Examiner: All right.

By Mr. Rogers:

Q. Can you tell us whether or not the subject of obtaining carpenters for your job came up at that time?

A. Yes, it did. The millwrights, rather. We wanted millwrights to put our machinery up.

Q. Will you tell us what was said about that subject?

A. Well, at that time we wanted to get a composite crew in there and put so many millwrights and so many iron workers to go along and put that job up.

Q. I see. And what, if any, arrangement did you make for getting your millwrights?

A. Well, at that time we got four or five millwrights the next day, and that was all we put on until we started overhead conveyers.

Q. Will you state whether or not you make any arrangement for obtaining millwrights?

A. Oh, yes.

Q. What were those arrangements?

A. Well, we went to the Local to get men to put our machinery parts on our conveyers.

Q. When you refer to the local, what do you mean?

A. The business local, Local 60.

Q. Now—

A. Mr. Smith, he was on East Street at the time when I went down to see him.

.

[fol. 42] By Mr. Rogers:

Q. Will you tell us whether or not Mechanical Handling Systems, Incorporated, has any labor agreement with the United Brotherhood of Carpenters?

A. We are affiliated with the United Brotherhood of Carpenters & Joiners, and the Iron Workers.

Q. Do you know whether or not that company has any contracts with the Carpenters?

A. We do in Detroit, yes, sir.

Q. Will you tell us whether or not at the time of your conversation with Mr. Smith the subject of that contract came up?

A. No, sir, it did not.

Trial Examiner: Now, you say at that time you had a contract with the—your company had a contract with the Carpenters in Detroit?

The Witness: The millwrights. It goes under the millwright local in Detroit.

Trial Examiner: In Detroit. And what did that cover? What area did that cover?

The Witness: Well, whenever we go out of town, wherever we go we work under the same agreement, you see. We work under the same agreement out of town as we do in.

Trial Examiner: Who was your contract with in Detroit?

The Witness: In Detroit?

Trial Examiner: Yes.

The Witness: With the millwrights, Local 1102.

Trial Examiner: Local 1102's jurisdiction extends where, if you know?

The Witness: I do not know.

Trial Examiner: Does it extend into Indiana?

The Witness: No, it doesn't.

Q. Who is Hafford Carter?

A. He's a man that used to work for me back in '45 and '46.

Q. Now, directing your attention to the latter part of [fol. 43] January, 1957, will you tell us whether or not you had occasion to be contacted by Stevenson or Carter with respect to possible employment?

A. They did. They came up to see me. I don't know what date it was.

Q. Where were you at that time?

A. I was still at the Ford Indianapolis plant.

Q. Do you recall the date at the present time, or approximate date?

A. Well, it was the second time they came there was February 6th, and before that it was about, I would say about two weeks before that.

Q. Now, at the time you had this—will you state whether or not at that time you had any conversation with these two men?

A. Well, they wanted—

Q. Will you just state whether or not you had a conversation?

A. Yes, I did, with Mr. Carter.

Q. Who else was present, if anyone?

A. Well, Ernie Wallace was present.

Q. Just so the record is clear now, will you tell us everyone who was present at that time, including yourself?

A. Well, Ernie Wallace and Mr. Carter and Mr. Stevenson.

- Trial Examiner: And yourself?

The Witness: And myself, yes.

By Mr. Rogers:

Q. Will you state for the record what the conversation was at that time?

A. Well, at that time they wanted a job, which I told them I didn't have any material in there to put them on at the time.

By Mr. Rogers:

Q. Mr. Roberts, will you state for the record how long you were at the Ford plant as superintendent of that job?

A. I was there from January 4th until the second day of July, 1957.

Q. Now, will you state for the record whether or not [fol. 44] you had a practice of any sort with respect to hiring employees?

A. Well, we hired them from—we got our men from the labor unions, from the local.

Trial Examiner: By "the local," you mean Local 60?

The Witness: That's right, Carpenters and Joiners.

By Mr. Rogers:

Q. And will you tell us whether or not you know what a referral card is?

A. Yes, sir.

Q. What is a referral card?

A. It is a small card they put the man's name on and Social Security number on, and send them out to the job to us.

Q. When you talk about "they," to whom do you have reference?

A. Well, the men of Local 60, Mr. Bereman, or whoever issues this referral card, then it is addressed to Roberts, or whoever it is on the job of Mechanical Handling Systems.

Q. Will you tell us whether or not during the time that you were job superintendent at the Ford plant project, you hired anyone who was not referred by the union?

A. No, sir.

Q. Now, was this or was this not the practice that was set up at the time you talked to Smith?

A. That's right.

Mr. McGowan: I object to that, Mr. Examiner.

Trial Examiner: Overruled. The answer is in.

By Mr. Rogers:

Q. Now, can you tell us whether or not at any time during the time you were superintendent of this job you hired any employees who were members of Local 60?

A. Yes.

Q. Can you tell us whether or not you at any time had occasion to contact Mr. Bereman?

A. Yes, sir.

Q. And on those occasions will you state for the record why you contacted Mr. Bereman?

A. Well, if a man on the job, say Mr. Bereman had men or Local 60 had, I mean, I tried to get the men to man my job.

[fol. 45] Q. Now, during the period of time you were superintendent of this job at the Ford Motor plant, will you tell us whether or not you were ever approached by any individuals seeking employment who had not been referred by the union?

A. Oh, I might have been. I don't—Maybe I didn't, didn't have any work for him or anything, but probably several men come out there every day and were looking for work.

Q. What, if anything, did you do with respect to these men?

A. I didn't do anything with them.

Trial Examiner: What do you mean by that, you "didn't do anything with them"?

The Witness: Well, I didn't hire any of them. I didn't need them.

By Mr. Rogers:

Q. Will you tell us whether or not at any time you have ever had occasion to direct a person seeking employment, any place?

A. Pardon?

Q. Have you ever had occasion to direct a person seeking employment to any place in particular?

A. Well, no, not to my—only men come out sometimes and wanted to ask me about a job or something like that.

Q. Well, specifically, will you state whether or not you have ever had occasion to direct a man to Local 60?

A. Yes, sir.

Q. For what purpose?

A. Well, a man—Mr. Carter is—he came to me, and Mr. Stevenson, and he wanted a letter to go—

Q. No. I just want to know what the purpose was for your directing anybody to either Local 60 or the District Council.

A. Oh, I didn't direct them any place. They come out and wanted a letter to go to the local. I didn't direct them no place.

Q. Directing your attention now to February 6, 1957,

will you state whether or not you had an occasion to talk to Hafford Carter or Elza Stevenson on that day?

[fol. 46] A. I did, sir.

Cross examination.

Did I understand you to say substantially to the effect that in Indianapolis, as well as other areas where you worked, that you contact local-union organizations to get your help?

A. Yes.

Q. Now, these referral slips that you referred to, those are slips, on this particular job here, those were slips which were from either the District Council or the local union?

A. That's right.

Q. In other words, if you needed men to staff your job then you went to the most practical source you knew and asked for men either by name or by number?

A. Well, I didn't ask for them by name. I didn't know the men.

Q. Just so many men needed?

A. That's right.

Q. Now, if people came on the job after you had made a request, did you have any other way to identify them except by referral slip?

A. No.

Q. And if they had no referral slip would you have anything to indicate their qualifications or probable qualifications to fill the jobs?

A. I don't know any man. I don't know what a man is when he comes out on the job.

Trial Examiner: Even if he has a referral slip you don't know whether he is qualified or not?

The Witness: That's right.

By Mr. McGowan:

Q. But you accept that referral slip as a recommendation of skill and craftsmanship?

A. Correct.

Q. You referred also to a letter which you gave to Mr. Carter or Mr. Stevenson, or both?

[fol. 47] A. That's right.

Redirect examination.

By Mr. Rogers:

Q. Mr. Roberts, will you state for the record whether you required a referral slip before you hired a man?

A. Well, as I—If a man comes out there, yes, I—

Q. And will you state for the record on what date you gave Mr. Carter and Mr. Stevenson this letter that's been mentioned?

A. February 6, 1957.

Q. And on that date did you have an occasion to have a conversation with those two men?

A. Not too much, no.

Q. Did you have an occasion to have any sort of a conversation?

A. No. They came in there and I was busy and I had the clerk type it up and I read it, and I signed it and gave it to them.

Q. Will you state for the record who was present at that time?

A. Ernie Wallace.

Q. That is, besides those men and yourself?

A. That's right.

(General Counsel's Exhibit No. 4 for identification was received in evidence.)

By Mr. Rogers:

Q. Mr. Roberts, I will call your attention to page 2 of General Counsel's Exhibit Number 4, at which point in

the third paragraph there appears this statement: "I also told both of them that they would have to first clear through the Carpenters' union."

A. That's right.

Q. Now, will you state for the record if that was a true and correct statement at the time you made it?

A. It was.

[Vol. 48] (The document previously marked General Counsel's Exhibit No. 5 for identification was received in evidence.)

RALPH R. SMITH, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. By whom are you employed?

A. The Indianapolis and Central Indiana District Council of Carpenters.

Q. What position do you hold?

A. I am the business representative.

By Mr. Rogers:

Q. Mr. Smith, are you an officer of the union?

A. No, sir.

Q. How did you obtain your job as business agent?

A. I was elected.

Q. By whom?

A. By the membership.

Q. Who is Sherman P. Roberts?

A. To my knowledge he is the superintendent for Mechanical Handling on the Ford Motor Company job.

Q. Now, directing your attention to the latter part of January, 1957; will you tell us whether or not you had

occasion to talk to Mr. Roberts with regard to the project at the Ford Motor Company plant?

A. Yes, I did; on several occasions.

Q. When was the first such occasion?

A. I don't recall the date. It was early in the year, January, February. I am not certain.

Q. Where did that conversation take place?

A. At the Ford Motor plant.

[fol. 49] Q. Do you recall at the present time whether or not anyone else was present?

A. Not to my knowledge. I talked with Mr. Roberts—I don't recall anyone else at the first meeting.

Q. Will you state for the record what the conversation was at that time?

A. The only conversation that I remember was about who was going to put some floor conveyers in the floor there, whether it would be done by the iron workers or the millwrights.

RONALD W. REEVES, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. What labor organization are you a member of?

A. Carpenters & Joiners of America.

Q. Are you affiliated with any local?

A. Local 60.

Q. And where is Local 60 located?

A. 531 East Market Street.

Q. What city?

A. Indianapolis.

Q. Have you ever heard of a concern doing business under the name of Mechanical Handling Systems, Incorporated?

A. Yes.

Q. Will you tell us whether or not you have ever been employed by that firm?

A. Yes.

Q. When?

A. Well, it was in February, in 1957, I started to work for them.

Q. In what capacity were you working for them?

A. Well, I started out as a journeyman.

[fol. 50] Q. Did that capacity at any time ever change?

A. Yes.

Q. What other position did you hold?

A. Foreman.

Q. Now, directing your attention to your being hired by Mechanical Handling Systems will you state whether or not you had a referral slip?

A. I did the morning I went to work.

Q. And from whom was that referral slip?

A. Well, it was signed by Smith.

Q. By Smith. That is—

A. That's the business agent.

Q. For what?

A. For the District Council.

Q. Now, based upon your experience as a member of the Carpenters' union in the Indianapolis area, will you state what the practice is, if any, with regard to men from other local coming into the area?

A. Well, they have to get a permit in order to come to work. That is the practice in all areas, not just in Indianapolis.

By Mr. Rogers:

Q. Will you state for the record whether or not there is any other way that men can go to work?

A. Why they can clear in through Indianapolis.

Q. What do you mean by clearing in?

A. Well, that's a process where you check out of one local and into another in another area.

Q. I see. Will you state for the record what you mean by a permit?

A. Well, you hold your status in your—Well, I will take that back! You give up your status in the local which you were formerly a member of when you take out a permit—I am sorry.

Trial Examiner: All right.

Mr. Rogers: Start again, and explain it, if you will.

A. (Continued) A permit. You continue to hold your status in your home local wherever that might be.

[fol. 51] By Mr. Rogers:

Q. I see.

A. And then you pay an assessment or—They give you a card—I have had several of them—but it is actually a double assessment is what it amounts to.

Trial Examiner: Now, isn't this it, which may be my understanding, that a man who is a member of a local outside of the jurisdiction of a local where he is going to work, he goes to that local and he asks for a permit to work; he remains a member of the local in which he holds his membership?

The Witness: Yes.

Trial Examiner: He works in this new district where he doesn't belong?

The Witness: Yes.

Trial Examiner: He pays for the services that this district gives him when he gets the permit card?

The Witness: That's right.

Q. All right. Now, based on your experience as a member of Local Number 60 of the Carpenters, what is the practice, if any, with regard to giving or not giving preference to local men over men coming in?

A. Well, they always give the local men preference if—especially if work is hard to get.

Q. Now, directing your attention again to these work permits, will you state for the record whether or not there is any time limit on these work permits?

A. Thirty days.

Trial Examiner: Pardon me just a moment, Mr. Rogers. Now, we are talking about work permits and we are talking about men working in Indianapolis on jobs. That refers to men who are members of the union, doesn't it?

The Witness: Yes.

Trial Examiner: And the jobs, referred jobs that are controlled by the union on which the union controls the labor; isn't that right?

The Witness: Yes.

Trial Examiner: Now, how would a non-union man go [fol. 52] about getting a job? Could he get a permit card from the union, from the local?

The Witness: No.

Trial Examiner: He could not get it?

The Witness: No.

Trial Examiner: Could a man who is not a member of the union, a non-union member, go to a union job where there is a union contract and get a job on that job?

The Witness: No.

Trial Examiner: He couldn't do it?

The Witness: Not as far as I know.

Trial Examiner: Not as far as you know. Thank you.

By Mr. Rogers:

Q. Now, Mr. Reeves, will you state what the practice is, if any, with regard to renewing work permits at the end of 30 days?

A. Well, you have to go down to the union hall and show that you are paid up in your own local, and your book is still in good standing in order to get that.

Q. You stated that permits were of 30-day duration. Will you state whether or not work permits are automatically renewed?

A. Well, if there's plenty of work, yes.

Q. And if there isn't plenty of work?

A. Then they don't renew them and these work permits are for out-of-town members or out-of-town members of the organization.

OTHO MATTHEWS, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. Will you state for the record what your occupation is?

A. Millwright.

Q. Will you state whether or not you are a member of any labor organization?

[fol. 53] A. I belong to Local 60 of the Carpenters and Millwrights, at 531 East Market Street.

Q. How long have you been a member of Local 60?

A. Approximately four years this last time. I was in once before.

Q. Have you ever heard of a concern doing business under the name of Mechanical Handling Systems, Incorporated?

A. I have.

Q. Will you state whether or not you have ever been employed by that firm?

A. I was.

Q. When?

A. This year, '57, from January, the latter part of January until about August.

Q. Now, will you state for the record what capacity you were employed in?

A. Foreman; millwright foreman.

Q. Now, directing your attention to the occasion of your being hired by Mechanical Handling Systems, will you state the facts and circumstances surrounding your being hired?

A. I was sent from the hall to the job with a card stating that I was capable of handling the job, that I was qualified to handle the job, and I was a paid-up member.

Q. And you said you were sent from the hall. What hall?

A. Local 60. I think the referral card, I don't recall clearly, but I think it was signed by Mr. R. Smith.

By Mr. Rogers:

Q. Now, directing your attention to the day you were hired, will you tell us whether or not you showed your referral slip to anybody other than Mr. Roberts?

A. I think that's the one I gave it to. I was sent to ask for Mr. Roberts.

By Mr. Rogers:

Q. Who is Ralph Smith?

[fol. 54] A. Business representative for District Council, Local 60.

DONALD E. ASHLEY, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. What is your occupation, Mr. Ashley?

A. Millwright.

Q. Will you state whether or not you were employed during the months of January and February, 1957?

A. I was.

Q. Where were you employed?

A. Mechanical Handling Systems, Ford Motor Company.

Q. Will you state whether or not you are a member of any labor organization?

A. I am a member of Local 60, Carpenters & Joiners of America.

Q. How long have you been a member of Local 60?

A. Twelve years.

Q. Now, will you state whether or not in the months of January and February, 1957, you held any position with regard to Local 60?

A. I was union steward on the job at Ford Motor Company for Mechanical Handling.

By Mr. Rogers:

Q. Directing your attention to your employment at Mechanical Handling Systems, Incorporated, and your status there as union steward, will you state whether or not you had any duties as steward?

A. As a union steward I checked all the cards that came on the job.

Q. I see. When you say you checked all the cards, what do you mean?

A. I checked the cards to see if they was union men. [fol. 55] and if they had a paid-up card.

Q. What do you mean by "a paid-up card"?

A. If the card was paid up in full.

Q. Did you have any other duties with respect to incoming men?

A. No.

Q. Did you have occasion to take the names and addresses of these men?

A. When I checked the cards they wrote their name and address down on a steward report.

Q. What, if anything, did you do with the names and addresses of these men?

A. I turned them over to the District Council.

Q. After a man coming in had checked with you, did you or did you not refer them to anyone?

A. They would come into the job and see Mr. Roberts first, and then they was referred to me.

Q. I see. Before they went to work?

A. Yes, sir.

Q. Now, based upon your knowledge obtained as a steward at Mechanical Handling Systems at the Ford plant, would you state whether or not there were any millwrights hired on that job who were not members of Local 60, or cleared by the Indianapolis & Central Indiana District Council?

A. There was not.

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ERNEST A. WALLACE, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. By whom are you employed?

A. Mechanical Handling Systems.

Q. What is your capacity?

A. General foreman.

[fol. 56] Q. Will you tell us whether or not you hold the same job now as you did in January and February of 1957?

A. Yes, sir.

Q. Can you tell us whether or not you had occasion to be in Indianapolis, Indiana in January and February of 1957?

A. Yes, sir; I was.

Q. How did it come to be that you were in Indianapolis, Indiana?

A. I come down to Indianapolis, Indiana to erect the overhead conveyer for Mechanical Handling Systems at Ford Motors.

Q. Now, when did you first get to Indianapolis? Is that in the record?

A. That was around, I would say around the 16th or 17th of January, to the best of my knowledge.

Q. Of 1957?

A. Fifty-seven; yes, sir.

Q. Do you know a man by the name of Ralph Smith?

A. Ralph Smith? Yes, sir.

Q. Who was Ralph Smith?

A. This gentleman over here (indicating).

Q. Do you know what his position is?

A. I assume he's business representative for the local or for this Indianapolis.

Q. When you first got to the Ford job in Indianapolis in January of '57, did you have any occasion to talk to Mr. Smith with regard to a practice to be followed in obtaining carpenters and millwrights?

A. I was on the project I would say about a week and a half when Mr. Smith come on the job and I was introduced by Mr. Roberts.

Trial Examiner: Did you send for Smith, or did Smith just come out there?

The Witness: No, sir. He made frequent visits to the Ford Motor Company installation.

Trial Examiner: I see. All right.

By Mr. Rogers:

Q. Now when, to the best of your knowledge was that?

A. Well, I would say that was around the 22nd or 23rd. [fol. 57] It was a week after I got into Indianapolis, approximately a week, or a week and a half, something like that.

Q. Where did this take place?

A. At Ford Motor Company.

Q. And who, if anyone else, was present?

A. Well, there was Mr. Roberts of Mechanical Handling Company, Larry Verkler of Mechanical Handling Company, and myself; and there was a gang of fellows, I couldn't recall all their names.

Q. Now, will you state for the record what was said at that time, if anything?

A. Well, to the best of my knowledge we were talking about the overhead conveyer when it started. We hadn't started it yet. We were talking about what union was going to do what work, and what union was going to do the other work.

Q. I see. And can you tell us whether or not there was any reference to the furnishing of men?

A. We were told that the men would come out of the labor pool.

Q. Out of what?

A. The labor pool or the union hall; that he would supply us with men.

Q. Who?

A. Mr. Smith.

Q. And will you tell us whether or not Mr. Smith said anything about the practice which would be followed?

A. No, sir. He just—he gave us the area practice or their sheet for Indianapolis territory governing their union members and their—I don't know, they work rules, and such as having water on the job and safety precautions, and et cetera and et cetera.

Q. Will you state for the record what the practice was with respect to obtaining a man for employment, a millwright?

A. Well, let me put it this way: On the overhead conveyor one craft installs one portion, the other craft installs the latter portion. The work was a little hard to base how [fol. 58] many men we needed at the time, but when we needed men for work we would call the union and prescribe so many men, so many welders, so many burners.

Q. At any time during your employment at the Ford job did you become aware that either Mr. Carter or Mr. Stevenson had made an application for work?

A. Well, the day I was introduced to Mr. Carter I didn't know Mr. Carter, but Mr. Stevenson had worked for me in Louisville, Kentucky at the General Electric job. That's back in the early '50s, '51 or '52, along in there. They come out to see about a position or a job at Ford Motor Company with us at Mechanical Handling.

Q. When was that?

A. Oh, boy, you have got me on dates. I would say, well, I hadn't started the overhead conveyor, I didn't start that until the middle of February, so it was around I would say the first part of February or the latter part of July—I mean January. Pardon me.

Q. Do you know whether or not Mr. Carter and Mr. Stevenson made more than one application for employment?

A. Well, they came out twice to my recollection. They come out the first time and asked how the job situation was, and at that time we were just working on the pits, on the tank conveyor, and we had our capacity of men there. In fact, I was just dead wood, so to speak, because I was down there two weeks before I started to work on the overhead.

Q. I see. On the occasion that they made their first

application for employment, did you have a conversation with them?

A. I talked to them, yes. We were introduced and we talked, talked about Louisville.

Q. Will you state for the record what that conversation was, to the best of your recollection?

A. You mean the first or second time?

Q. The first time.

A. The first time they just talked about a job and Sherm [fol. 59] told them—Mr. Roberts told them that at the time, the first time, that there was no work because we had no prints or no steel for the overhead, and we had a full crew, and he couldn't put them to work. That was the first time.

Now, the second time they came out was, I would say, a week or two weeks after the first time they came out. They came out to see how the work situation was, if we had our prints, if we could go ahead to work on our overhead or could he hire more men.

Q. I see. Where was that?

A. That was at Ford Motor Company.

Q. And was anyone else present at the time you talked to them on that occasion?

A. Not in the immediate office; no, sir, there wasn't.

Q. Have you given us the entire conversation that you had on that occasion?

A. To the best of my ability, sir, I have. I may have left out parts, I couldn't remember.

Q. Now, do you recall whether or not on either of those occasions there was any reference made by either yourself or Mr. Roberts to clearing into the union?

A. Well, what I recollect on that clearing-in business or permit business, that's how the letter come about so that they wouldn't have, so to speak, no trouble of going down there presenting their credentials to get a permit; and the reason they wanted a letter to get the permit was that when we had work they would be given a call and there would be no red tape or lost time, they would just come on the job.

Q. I see. Now, directing your attention to the period of time immediately following their second application for

employment, will you state whether or not you had occasion to talk to either Mr. Carter or Mr. Stevenson?

A. In what way, sir? I mean, just talk—talk shop or just personal talk, or what?

Q. Well, to be more specific: Directing your attention to the 7th—well, strike that. The day following their application for employment on the second occasion, will you tell us whether or not you had a telephone conversation with Mr. Stevenson?

[fol. 60] A. I did, sir.

Q. Where were you at the time you had this conversation?

A. Ford Motor Company, in the crib. That's Mechanical Handling's crib.

Q. Will you tell us how you knew you were talking to Mr. Stevenson?

A. He identified himself, told me who he was.

Mr. Rogers: What was that conversation?

A. You mean the conversation on the phone?

By Mr. Rogers:

Q. Yes.

A. Mr. Stevenson called, he wanted to talk to Mr. Sherm Roberts. Mr. Roberts was out of the crib and I told him who I was and he told me he had brought the letter down to the hall and he could not get a permit, and he said something about if he did get a permit there would be some kind of charge against him. I told him I had never heard of such a thing, to contact the International.

Cross examination.

By Mr. Ruegsegger:

Q. Did you have any contact with Mr. Carter after that second occasion?

A. No, I didn't. You mean on the telephone conversation?

Q. After the second occasion when Mr. Carter and Stevenson were out at the plant?

A. Yes, sir.

Q. Inquiring for work, and the letter was given?

A. Yes, sir.

Q. And the only contact that you had after the second time that you and Mr. Roberts talked to Messrs. Carter and Stevenson on or about February 6th, is the telephone conversation that you have told us about with Mr. Stevenson?

A. Yes, sir.

[fol. 61] Cross examination.

By Mr. McGowan:

Q. Mr. Wallace, you heard Mr. Roberts' testimony with relation to the letter that was given to Mr. Carter and Stevenson?

A. Yes, sir.

Q. And the reasons it was given at their urging, to this testimony?

A. Pardon me.

Q. It was given at their urging to satisfy them at their request. Did you hear him testify to that?

A. What I recollect was—I don't know who specifically asked for it. I didn't pay too much attention, but I do know, in fact, I dictated the letter.

SHERMAN P. ROBERTS, a witness recalled by on behalf of the General Counsel, resumed the stand and testified further as follows:

Further redirect examination.

Q. Following the date of February 6th did you or did you not hire more than one millwright?

A. Yes.

Trial Examiner: How many would you say you hired after that?

The Witness: Well, I would say about 12 or 15.

Trial Examiner: Twelve or 15. How many millwrights did you have altogether on that job?

The Witness: We had about 25.

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By Mr. Rogers:

Q. Mr. Roberts, I again show you a document which has been marked for identification as General Counsel's Exhibit Number 3, and ask you to state what that is?

A. That is an International agreement with the United Brotherhood of Carpenters & Joiners of America.

Q. And that's an agreement between the Carpenters [fol. 62] and what company, if any?

A. Mechanical Handling Systems.

Q. Now, will you state whether or not you have ever had a copy of that contract in your possession?

A. Yes, I have.

Q. Can you state whether or not that contract was in effect during the months of January and February, 1957?

Mr. McGowan: Objection, Mr. Examiner.

A. It was.

Trial Examiner: I beg your pardon?

Mr. McGowan: May I object to that?

Trial Examiner: Overruled. Answer the question.

A. (Continued) It was.

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(The document previously marked General Counsel's Exhibit No. 3 for identification was received in evidence.)

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RALPH R. SMITH, a witness recalled by and on behalf of the General Counsel, resumed the stand and testified further as follows:

Further direct examination.

By Mr. Rogers:

Q. Mr. Smith, will you state whether or not during the months of January and February you held any office with the District Council, Indianapolis & Central Indiana District Council?

A. Not as an officer, no.

Q. Isn't it a fact that you were president of District Council until June 6th, or June 7, 1957?

A. I believe you are right.

By Mr. Rogers:

Q. Now, Mr. Smith, yesterday you testified that you had a meeting with Mr. Roberts in January of 1957 at the Ford plant. Now, isn't it a fact that at that time you discussed the matter of arrangements between Mechanical Handling [fol. 63] Systems, Incorporated, and the District Council for procuring millwrights for that job?

A. At that time I gave him a copy of the contract that we had with the General Contractors Association, which we asked that he work under.

By Mr. Rogers:

Q. Mr. Smith, I will show you a document which has been marked for identification as General Counsel's Exhibit Number 6, and ask you if that isn't the affidavit you gave to the National Labor Relations Board?

A. Yes, that's right.

Q. Now, I direct your attention to the fourth paragraph of that affidavit and specifically direct your attention to this statement: "This was just shortly—" referring to Mr.

Roberts—"This was just shortly after he arrived in the area, and he advised me that his company had an International agreement with our union, and that he would abide by its terms."

Does that refresh your memory in any way with respect to whether or not Mr. Roberts advised you of the International agreement, and that he would abide by its terms?

A. Specifically I don't remember that conversation now. The gentleman who came to the office and asked that I write this, made a—put a certain number of things in there—as a matter of fact, he asked several of these questions and he did ask about an International agreement.

Q. Now, this affidavit was true and correct at the time you gave it, was it not?

A. It still is.

Trial Examiner: What is the answer?

The Witness: It still is true.

(The document previously marked General Counsel's Exhibit No. 6 for identification was received in evidence.)

Mr. Rogers: At this time, Mr. Trial Examiner, I propose a stipulation that the document marked for identification as General Counsel's Exhibit Number 7 is the constitution, bylaws and trade rules of the Indianapolis District Council, which was in effect from August 17, 1954 until March 7, 1957; and that General Counsel's Exhibit Number 8 is the constitution, bylaws, and trade rules of the Indianapolis & Central Indiana District Council, which has been in effect since March 7, 1957.

Mr. McGowan: Is that right?

The Witness: If those dates are correct it is right.

Mr. McGowan: Yes, we agree to it.

Mr. Ruegsegger: I don't know.

Trial Examiner: He wouldn't know, of course.

Then the documents may be, under the stipulation, the ones that are marked 7 and 8 for identification, the constitutions and bylaws, will be admitted in evidence.

(The documents previously marked General Counsel's Exhibits Nos. 7 and 8 for identification were received in evidence.)

By Mr. Rogers:

Q. Now, Mr. Smith, directing your attention to the early part of February, 1957, you had an occasion to talk to Mr. Elza Stevenson and Mr. Hafford Carter with regard to their request for a work permit, did you not?

A. Yes, I did.

Q. And at that time these men presented to you a letter from superintendent Roberts, didn't they?

A. They said it was from Roberts.

Q. Did they show you the letter?

A. They gave me a letter; they said that Mr. Roberts had sent to me by them.

Q. I will show you the document which has been marked for identification as General Counsel's Exhibit Number 5, and ask you if that isn't the letter that they showed you?

A. I believe it is. I had it in my hand only a few minutes and I couldn't be certain.

Q. To the best of your knowledge is it the same document?

[fol. 65] A. I assume it is. I don't have any way of knowing.

Q. Now, what did you do?

A. When these gentlemen gave me this letter I didn't know whether it was a letter from Mr. Roberts or not.

Q. Did you give them a work permit?

A. No, I didn't give them a work permit. I told them that I would go out and talk to Mr. Roberts and see if this letter was from him.

Q. They had asked you for a work permit, had they not?

A. Yes, I believe they had.

Q. Now, on the following day you also had a conversation with these two men, didn't you?

A. I think so.

Q. And again they asked you for a work permit, didn't they?

A. I believe they did.

Q. And again you did not give them a work permit?

A. No. I don't give work permits.

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Cross examination.

By Mr. McGowan:

Q. Mr. Rogers asked you some questions about your conversation with Mr. Roberts when you first saw him out on that job out there.

A. Yes, sir.

Q. And I believe you recall accurately that that affidavit mentioned the International agreement, and you stated that you had given him a contract?

A. That's right.

Mr. McGowan: I would like this marked as Respondents' Exhibit Number 1.

(Thereupon, the document above referred to was marked Respondents' Exhibit No. 1 for identification.)

By Mr. McGowan:

Q. Mr. Smith, I will show you what has been marked as Respondents' Exhibit Number 1, and ask you if that is the agreement to which you refer?

[fol. 66] A. This isn't the exact agreement I gave him. There have been two changes in it.

Q. Will you point out the changes?

A. The two changes in this agreement were wages—that would be wrong. That may be the only change that we made; that this agreement is different from the agreement that I gave him is wages.

• • • • •
Q. Now, can you tell us, in your conversation with Mr. Roberts if you reached any agreement or understanding as to the hiring practice which would be followed other than might be implied from anything in that document that you gave him?

A. I gave Mr. Roberts the agreement, and I said, "We

live by this 100 per cent. What is in it we will do. That's our agreement with you."

Q. My question is directed to this, Mr. Smith: Is there anyone other than yourself connected with the District Council or the local union, who would have the authority to make any agreement whatsoever with Mechanical Handling Systems on that job?

A. I would be the only one that could make an agreement officially.

Q. There is no one else in authority to make an agreement?

A. No.

Q. Mr. Rogers asked you a question which, if my memory is correct, was whether or not you had told Mr. Stevenson or Mr. Carter, or either of them, that they would have to clear into Local 60. Do you recall that question?

A. I recall the question, yes.

Q. And you said no; is that correct?

A. I said no.

Q. Did you tell them they would have—Did you say anything to them in regard to clearance or necessity for clearance other than into Local 60?

[fol. 67] A. That's been a long time ago.

Q. To the best of your recollection?

A. I would suggest to anybody working in this district, no matter who they were, that they should clear into this district if they wanted to work here. I don't specifically recall saying that to him or to anybody, but that's my usual instructions.

Redirect examination.

Q. . . .

Mr. Smith, on that occasion when you were talking to Mr. Roberts you didn't sign any documents of any kind, did you?

A. No.

Q. And Mr. Roberts didn't sign any documents of any kind, did he?

A. No.

Recross examination.

By Mr. McGowan:

Q: Let me ask you this, Mr. Smith: In connection with the relationship between any particular contractor and the District Council, where you have an agreement in effect, is your relationship controlled by your agreement or by your bylaws?

A. Our relationship is controlled by the agreement we have with the Contractors Association.

HAFFORD B. CARTER, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. Can you tell us whether or not you have ever been employed by Mechanical Handling Systems, Incorporated? fol. 68] A. Yes, sir.

Q. Where?

A. In Detroit first, and, oh, innumerable places for two or three years. The last time in Louisville, Kentucky for about two-and-a-half years.

Q. In what capacity were you employed by Mechanical Handling Systems?

A. Millwright foreman.

Q. Will you tell us whether or not you are a member of any labor organization?

A. The Millwrights.

Q. What local are you a member of?

A. At that particular time it was 2209 in Louisville. At the present it is 576, Pine Bluff, Arkansas.

Q. Will you tell us whether or not you have ever been a member of Local 60, United Brotherhood of Carpenters & Joiners of America, AFL-CIO?

A. In Indianapolis, no, sir.

Q. Will you tell us whether or not you have ever cleared into the Indianapolis & Central Indiana District Council of the Carpenters?

A. No, sir.

Q. Now, directing your attention to the latter part of January, 1957, did you have occasion to go to Indianapolis?

A. Yes, sir.

Q. From where?

A. From Louisville, Kentucky.

Q. On that occasion can you tell us whether or not anyone went with you?

A. Mr. Stevenson.

Q. Now, to the best of your recollection when did you come to Indianapolis?

A. I couldn't give you the exact date, but it was in the latter part of January.

Q. Now, on the day that you came to Indianapolis can you tell us whether or not you had occasion to go to the offices of Local 60 of the Carpenters?

[fol. 69] A. We did.

Q. On that occasion did you have a conversation with anyone?

A. When we came over here we first went to the local and there was no one there. It was lunchtime or thereabouts.

Q. Did you talk to anyone while you were there?

A. Yes, sir. That's what I am trying to think about. Anyway, the business agent was not there, and someone in charge, whoever it was, told us that he wouldn't be back until after 4:30, probably 5:00 o'clock in the afternoon, and the financial secretary was sick and he wouldn't be in. In other words, there would be no one in until around 4:30 or 5:00 o'clock in the afternoon.

Q. Who was present when you had this conversation?
A. Mr. Stevenson.

Q. Will you state the circumstances surrounding the reasons for your trip to Indianapolis?

A. I had been working for Mechanical Handling Systems for the past two-and-a-half years over in Louisville, and my field supervisor, Mr. Simpson at that time, we were working at General Electric Company, and they had dropped—General Electric had dropped all of their contract that they had already awarded for '57 and '58. And Mr. Simpson—

Q. Just a moment, Mr. Carter. Can you tell us whether or not you had a conversation with Mr. Simpson?

A. Mr. Simpson?

Q. Yes.

A. Well, he was my field supervisor at that time in Louisville, Kentucky.

Q. Did you have a conversation with him which bore on the reasons for your coming to Indianapolis?

A. Yes, sir.

Q. When did you have such a conversation?

A. About two days before I came over here.

By Mr. Rogers:

Q. Now, directing your attention, Mr. Carter, to the occasion when you were in Indianapolis in January, 1957, [fol. 70] will you tell us whether or not you had a conversation on that day with Mr. Sherman T. Roberts?

A. Yes, sir.

Q. What time of day did you have that conversation?

A. It was in the afternoon, after 12:00, but what time I couldn't say exactly.

Trial Examiner: What is the date of that?

The Witness: I couldn't say definitely.

Mr. Rogers: Late in January is his testimony.

Q. I see. And where did this conversation take place?

A. At the Ford Motor Company in Indianapolis.

Q. Fill you state for the record what that conversation was?

A. It was about work in—I had worked for Mr. Roberts beforehand, and my supervisor from down at Louisville had recommended me to come over here for three or four months—

Trial Examiner: Is that what you told Roberts?

The Witness: Yes, sir.

Trial Examiner: All right.

A. (Continued) And also I had worked for Mr. Roberts beforehand, and he told us at that particular time he would like to have us on the job, but we would have trouble getting through the local.

By Mr. Rogers:

Q. Will you state whether or not you asked Mr. Roberts for employment?

A. Yes, sir; I did.

Q. Now, can you tell us whether or not you were employed?

A. At that time, no.

Q. Can you tell us whether or not Mr. Roberts gave you any reason for not employing you at that time?

A. Not any more so than as to whether or not I could get clearance through the local.

Trial Examiner: How did Roberts put that to you? Just what did he say, as near as you can remember?

The Witness: As near as I can remember, sir, he said [fol. 71] that he would like to have me especially as I had worked for him before, on the job, it was just beginning, but he felt like that I would have an awful lot of trouble getting through the local and getting a clearance card to go to work; and for me to go back down to the local and wait until someone came in to see as to whether or not I could get clearance.

Trial Examiner: Thank you.

By Mr. Rogers:

Q. Can you tell us whether or not Mr. Roberts at that time said anything with regard to lack of materials?

A. Yes, sir. He said that the job was just beginning and all the material was not there, he did not have his blueprints and things there at that time.

Q. Can you tell us whether or not anything was said with respect to the subject of your coming back?

A. Yes, sir.

Q. What was said on that subject?

A. We came back to the union hall and the financial secretary—

Q. I am just interested in what Mr. Roberts told you.

A. Yes, sir. The financial secretary told us to—or someone there, I wouldn't say who it was, told us we would have to go to the District Council, and at that time it was only about a block, oh, a half a block from the union hall, and so we went around into the District Council and someone was there, I cannot remember his name, but anyway we talked to him and told him what Mr. Roberts had told us.

Q. Who was there at that time?

A. I don't know his name. Mr. Stevenson and myself and this other person.

Q. What time of day did that take place?

A. That was late in the afternoon, around, oh, 4:00—

Q. Was this before or after you had talked to Mr. Roberts?

A. After.

Q. And where did you say this conversation took place?

A. In the District Council office, I presume, at that time.

Q. I see. Will you tell us what that conversation was?

[fol. 72] A. We told him what Mr. Roberts had told us and whoever the gentleman was, he said, "Well," he says, "I can't take your word for it." He says, "Can you get in touch with him?"

Well, it was after working hours at this particular time, so I called Mr. Roberts on the telephone.

Q. Was that at the same time?

A. Sir?

Q. Was that at the same time you had the conversation with this man at the District Council, that you called Mr. Roberts?

A. Yes, sir.

Q. All right.

A. And he talked to Mr. Roberts and he instructed me to listen in on the telephone, which was on the next desk, to their conversation. Mr. Roberts told him that he would like to have us to go to work some time the following week; and whoever this gentleman was, he says, "Well, I can't give him a permit at this time to hold in his pocket. Send them back here then."

Q. Was that the extent of the conversation?

A. Yes, sir. And at that time Mr. Roberts also instructed me to call him back within two weeks, that he would definitely have work for us.

Q. All right. Now, can you tell us whether or not there after you did call Mr. Roberts at any time?

A. Yes, sir; I did.

Q. When did you call him?

A. Approximately two weeks thereafter.

Q. Do you recall the date?

A. I would say it was on the 6th of February. No, on the 5th.

Q. Of what year?

A. 1957.

Q. Now, where were you at the time you placed that call?

A. I was home in Louisville, Kentucky.

[fol. 73] Q. Can you tell us whether or not the voice on the other end of the line at that time identified itself in any way?

A. It was Mr. Roberts definitely.

Q. Will you tell us what that telephone conversation was?

A. He told me to come over the next day and get Mr. Stevenson, that he had plenty of work and would definitely like to have us go to work at that time.

Q. All right. Now, directing your attention to the following day, what, if anything, did you do?

A. We came to Indianapolis.

Q. Who is "we"?

A. Mr. Stevenson and myself.

Q. And on that day will you tell us whether or not you had an occasion to talk to Mr. Roberts?

A. Yes, sir.

Q. Where were you?

A. Out at the Indianapolis Ford plant.

Q. And where were you at that time?

A. At what we called their "office," their place where they stored materials and—

Q. Was anyone else present?

A. Yes, sir.

Q. Do you recall who?

A. Mr. Wallace and their foreman that they had brought from Detroit. . . .

Q. All right. Will you tell us what that conversation was?

A. Mr. Roberts told—well, there was a Mr. Jones, I had been in Anderson, Indiana overnight looking for work over there, and a Mr. Elwood Jones came down with me, and we met Mr. Stevenson at the Local, Local Union 60 here, and the three of us went out to the Ford Motor Company, and Mr. Roberts told us at that particular time that he would definitely like to have us to go to work at that time, right then if possible.

Q. Now, when he said he would like to have you go to work, to whom did he have reference?

[fol. 74] A. Me and Mr. Stevenson. He said not Mr. Jones, because he had not promised him work beforehand.

Q. What, if anything else, was said?

A. He said we would—He and Mr. Wallace said that we were still going to have trouble trying to get through the union, and didn't know as to whether or not we would, but he was going to give it a try. And Mr. Wallace recommended that he give us a letter of recommendation, and

Mr. Roberts said, "Well, that will be all right. Go ahead and write it up and I will sign it."

Q. Can you tell us whether or not Mr. Roberts did give you such a letter of recommendation?

A. Yes, sir.

Q. Now, thereafter on that day can you tell us whether or not you had occasion to go to the offices of Local 60?

A. Yes, sir.

Q. What time of day was it?

A. Well, it was in the afternoon.

Q. Now, on that occasion can you tell us whether you had a conversation with anyone?

A. We went to Local 60 and presented this letter, and whoever was there, I take it to be the financial secretary, it could have been the business agent, he said that he couldn't do anything about it, we would have to go to the District Council.

Q. Was anyone else present at that time?

A. Mr. Stevenson and myself.

Q. Now, following that did you have occasion to go to the offices of the District Council?

A. We did.

Q. Can you tell us whether or not you saw anyone over there?

A. Yes, sir.

Q. Whom did you see over there?

A. At that particular time I didn't know. We assumed that it was the business agent for the District Council.

Q. Can you state whether or not you had a conversation with that individual?

[fol. 75] A. Yes, sir.

Q. Who else was present, if anyone?

A. There was a secretary, and Mr. Stevenson and myself.

Q. All right. Will you state for the record that conversation as you now remember it?

A. We asked for a permit to go—

Mr. McGowan: Mr. Examiner, I object, unless he can identify the man he was talking to.

Trial Examiner: Do you know who you talked to?

The Witness: I do now, yes, sir.

Trial Examiner: Can you tell us who it was?

The Witness: This gentleman over here, Mr. Smith.

Trial Examiner: All right. Overruled. Go ahead and answer the question.

By Mr. Rogers:

Q. State the conversation.

A. We asked for a permit to go to work, and we also had a clearance from the Louisville local written out in the back of our book. We asked for a permit or permission to clear in to go to work.

Q. What, if anything, did he say?

A. Pardon me?

Q. What, if anything, did he say?

A. That was in the afternoon. He said, well, he would have to talk to Mr. Roberts. We presented this letter to him. He said he would have to talk to Mr. Roberts first as to whether or not it was—well, I presume, whether or not it was original, authentic, and for us to come back the next morning.

Q. Directing your attention now to the following morning, can you tell us whether or not you did go back?

A. Yes, sir.

Q. Now, what time of day was it?

A. It was before 8:00 o'clock, or thereabouts.

Q. Did you have a conversation when you got there, with anyone?

A. Yes, sir. With the same gentleman.

Q. Now, who was present at that time?

A. Practically the same ones.

Q. Well, practically was it—

[fol. 76] A. The secretary and Mr. Stevenson and myself.

Q. All right. Will you state what that conversation was at that time?

A. We asked him if he had talked to Mr. Roberts and he said no. We asked him if we could get a permit to go to work. "No." And we asked him if we could clear our book in and go to work. "No." And if we did try to clear

our book in he would see that charges were preferred against us.

Q. Do you recall anything further that was said?

A. Mr. Stevenson asked him if that was his final words, he was not going to give us a permit, and he said definitely yes, and turned and walked away.

Q. Now, can you tell us whether or not you had occasion to go to the offices of the International?

A. Yes, sir.

Q. That day?

A. Yes, sir. We went to the International office here in Indianapolis following that, and talked to a Mr. Schutes, I believe.

Q. Mr. who?

A. Shuey, I believe is his name.

Q. All right. Will you state what conversation you had at that time?

A. We stated our case to him, what had happened, and he told us at that time that in all probabilities if we could come back within the following—the next week I believe it was, that he could get our book cleared in, and he didn't think there would be any charges preferred against us.

Q. Did he say anything to you about whether or not charges could be levied against you?

A. To the best of my knowledge I don't believe he did.

Q. Could you tell us whether or not you ever did receive a work permit?

A. No, sir.

Q. Can you tell us whether or not you were ever employed by Mechanical Handling Systems in Indianapolis?

A. No, sir.

[fol. 77] Cross examination.

Q. Mr. Carter, the first time you talked to Mr. Smith he explained to you, isn't it so, that he wanted to check the letter to find out if it was authentic?

A. Yes, sir. And he also said he would call out there that afternoon, and Mr. Wallace stayed on the job until 6:00 o'clock that night waiting for his call.

Q. No, I am talking about the time when you first went in and he explained he would have to check on the letter. Did he leave then at the end of that conversation?

A. He said that he—He told us that he would check on it.

Q. Then what happened?

A. As far as I know he turned and went back to his desk or his secretary, or something, at that particular time.

Q. That's what I say; he went away?

A. Right.

Q. And then you left?

A. That's right. He told us to be back there the next morning at 7:00 o'clock, or 7:30.

Q. You took the letter with you?

A. We did.

Q. How did you expect him to check? Can you explain that, if you took the letter with the company name and the man's name on it?

A. He had Mr. Roberts' phone number and he could ask him whether or not he signed this letter for us.

Q. Where did he have the phone number?

A. Mr. Smith did.

Q. Where?

A. Mr. Roberts had already talked with him once that day.

Q. Were you there at the conversation?

A. No, sir, but he came back and told us that he had.

Q. Mr. Roberts told you that he had talked to him?

A. That's right.

Q. When you came back the next day it is so, isn't it, [fol. 78] that Mr. Smith again told you he would have to check for the same reason as the first day; isn't that a fact?

A. He told us he had not checked and wasn't going to.

ELZA STEVENSON, a witness called by and on behalf of the General Counsel, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. Will you tell us whether or not you are a member of any labor organization?

A. Yes, sir.

Q. What labor organization?

A. 2209, Millwrights.

Q. Will you tell us whether you have ever been employed by Mechanical Handling Systems?

A. Yes, sir.

Q. When?

A. On the General Electric job at Louisville, Kentucky, off and on all through the job.

Q. When were you last employed by Mechanical Handling?

A. In August of '56 I think it was.

Q. Will you tell us whether or not you have ever been cleared by or become a member of Local 60 of the Carpenters in Indianapolis?

A. No, sir.

Q. Can you state whether or not you have ever become a member of or been cleared by the Indianapolis & Central Indiana District Council?

A. No, sir.

Q. Now, do you know a man by the name of Hafford B. Carter?

A. Yes, sir.

Q. Who is Hafford B. Carter?

[fol. 79] A. A fellow which I traveled here with to Indianapolis seeking employment.

Q. Now, directing your attention to the latter part of January, 1957, will you tell us whether or not you and Carter made a trip to Indianapolis?

A. Yes, sir.

Q. To the best of your recollection when did you make that trip?

A. Well, that was on Tuesday, two weeks before the 6th of February. I don't know what the date was, but it was two weeks before the 6th.

Q. On that occasion when you arrived at Indianapolis, what, if anything, did you do?

A. Well, we first came to the local the best I remember, and we went to the Ford Motor plant.

Q. Now, following that you testified you went to the Ford Motor Company plant?

A. Yes, sir.

Q. Where did you go?

A. Well, we went to Mechanical Handling office, or the little crib, whatever they called it.

Q. Can you tell us whether or not you saw anybody there?

A. Yes, sir.

Q. Who did you see?

A. Mr. Sherman Roberts and Mr. Wallace.

Q. And can you tell us whether or not you had conversation with Mr. Roberts at that time?

A. Yes, sir.

Q. Will you tell us about that conversation?

A. Well, we asked them how the job was getting along, and if he needed any help, and that Mr. Simpson, the field superintendent down at General Electric had told us that this job was starting, and it might pay us to take a run up and see if he needed any men.

Q. What, if anything, did Roberts say?

A. Well, he said at that time that he didn't have all [fol. 80] the prints in, and the monorail hadn't come in yet, the steel for the monorail.

Q. Can you tell us whether or not Mr. Roberts said anything with regard to employing you?

A. Yes. He said he would like to have us work for him, Mr. Carter had worked for him before, he didn't know

me, I had never worked for him before, but I had worked for Mr. Wallace and—

Mr. McGowan: For Mr. who?

The Witness: Mr. Wallace, Wally, or whatever.

By Mr. Rogers:

Q. Do you recall whether or not Mr. Roberts had anything to say with regard to your coming back?

A. Yes, sir. He told us that he would have a job for us in a few days, as soon as the prints came in, and the monorail got started.

Q. Do you recall anything further about that conversation?

A. Well, he told us if we could clear through the union why we had a job any time we got through.

Q. Now, state whether or not on that day you had occasion to go to the offices of the District Council?

A. Yes, sir.

Q. When?

A. We came back from Ford Motor Company and went to the union hall to see about clearing in, or getting a permit to go to work.

Q. What time of day did you get to the District Council?

A. Well, we got over to the District Council around 4:00 o'clock, something like that.

Q. When you got there did you see anyone?

A. Yes, sir; this gentleman that was setting right over here this morning, the tall fellow. He made himself known as he organized labor and all in this district.

By Mr. Rogers:

Q. I am not sure that it is in the record: Now will you [fol. 81] state whether or not this man identified himself in any way?

A. Yes, he did. He introduced—We introduced ourselves to him and he told us who he was, but I don't recall his name.

Q. Do you recall whether or not he told you what capacity he held, if any?

A. He was a member of the District Council.

Q. Now, was anyone else present at that time?

A. Mr. Carter.

Q. And what, if any, conversation did you have with this man?

A. Well, we told him that we were from Louisville, and we had been out to the Ford plant, and Mr. Roberts told us that he would like for us to clear our book in, or else get a permit to go to work, because he wanted us in the next few days, or when we could get through the union.

Q. What, if anything, did he say?

A. Well, he didn't seem to care too much about it; and so Mr. Carter asked him would he talk to Mr. Roberts if he got him on the phone, to confirm our conversation.

Q. Well what, if anything, happened then?

A. Well, Mr. Carter called Mr. Robertson on one phone and this fellow talked to him on the other. He picked the phone up on the other desk and he talked with Mr. Roberts.

Q. Following that telephone conversation, can you tell us whether or not the District representative, or the man there at the District Council office said anything to you?

A. Yes, sir.

Q. What did he say?

A. He told us that being as we didn't have a job right then, Mr. Roberts told us that he didn't need us right that day but said he would use us in a few days, he told us to come back, or told us he couldn't give us a work permit right then to carry around in our pockets, being as we didn't have a job, but when we come back he would see what he could do for us.

Q. Will you state for the record whether or not you were given a work permit at that time?

A. No, we wasn't.

[fol. 82] Q. Now, directing your attention to February 6, 1957, will you state whether or not you had occasion to come to Indianapolis, Indiana on that day?

A. Yes, sir.

Q. And will you state whether or not on that day you saw Mr. Hafford Carter?

A. Yes, sir. He came to Local 60, him and Mr. Jones, in the neighborhood of 10:30.

Q. Now, will you tell us whether or not on that day you had an occasion to talk to Mr. Roberts?

A. Yes, sir. We left—

Q. What time of day was it when you talked to Mr. Roberts?

A. Approximately 11:00 o'clock.

Q. And where was it that you talked to Mr. Roberts?

A. At the Ford Motor Company, in the little crib or office he had there.

Q. Was anyone else present?

A. Yes, sir. Mr. Carter and also Mr. Jones and Mr. Wallace and the timekeeper.

Q. All right. Will you state for the record what conversation took place?

A. Well, we told him we were back ready to go to work and he asked us had we cleared through the union, and we told him no, and he said, well, he had a foreman come down from Detroit and he had to give him a shipping letter to get him through the union.

Q. Can you tell us whether or not Mr. Roberts said anything with regard to having any employment for you?

A. Yes. He told us we could go to work as soon as we got through the union, he would expect us on the job the next morning at 8:00 o'clock.

Q. Now, you mentioned a shipping letter. What do you mean by a shipping letter?

A. Well, I reckon it is something that's commonly used with a contractor sending a new man into a new district somewhere.

Q. Will you tell us whether or not Mr. Roberts gave you anything on that day?

[fol. 83] A. Well, Mr. Wallace suggested that they write us a letter, but it wasn't a shipping letter or it wasn't a shipping-letter form or so. He said it would be the same or similar to a shipping letter.

Q. I see. And did or did not Mr. Roberts give you anything on that day?

A. Yes, sir. He gave us the letter to the union.

Q. I hand you the document which has been marked for identification as General Counsel's Exhibit Number 5, and ask you to state what it is?

A. This is the letter that we brought to the union.

Q. Can you tell us whether or not that's the letter Mr. Roberts gave you?

A. Yes, sir.

Q. Now, on February 6, 1957, can you tell us whether or not you had occasion to go to the offices of Local 60?

A. Yes, sir. We came from the Ford Motor Company back to Local 60.

Q. About what time of day?

A. Oh, it was approximately 1:00 o'clock.

Q. And can you tell us whether or not you saw anyone at the offices of Local 60?

A. We saw the financial secretary, I reckon it was Mr. Donald—I forget his name.

Q. How did you know it was the financial secretary?

A. Well, he said he was the financial secretary.

Q. Did you have a conversation with the financial secretary?

A. Yes, sir. We presented him the letter and—

Q. Who else was present?

A. Mr. Carter.

Q. Just the three of you?

A. Yes, sir.

Q. What was that conversation?

A. We gave him the letter and asked him if we could get a permit to go to work.

Q. What, if anything did he say?

A. He told us he didn't issue permits, and with a letter like that we would have to go to a District Council.

Q. On February 6th can you tell us whether or not you [fol. 84] had an occasion to go to the offices of the District Council?

A. Yes, sir.

Q. When did you go to the offices of the District Council?

A. Well, immediately after we left the Local 60 we went right straight on down to the District Council.

Q. When you got there did you see anyone?

A. Yes, sir.

Q. Whom did you see, if you know?

A. Mr. Smith.

Q. Can you tell us whether or not you had a conversation with Mr. Smith at that time?

A. Yes, sir.

Q. All right. Will you state for the record what was said in the course of that conversation?

A. Well, we identified ourselves as millwrights, that we had been out to the Ford plant and Mr. Roberts had given us a letter, and we gave it to him and told him that we wanted to go to work, and asked him for a permit to go to work.

Q. What did Mr. Roberts say—Mr. Smith say, if anything?

A. Well, he said for us to leave the letter there that afternoon and he would check with Mr. Roberts and see what about the letter, and let us know something the next morning around 8:00 o'clock.

Q. Will you tell us whether or not that was the extent of the conversation?

A. Well, we wanted to discuss it farther, and he went on back into the back room out of our presence.

Q. Will you state whether or not you left the letter with Mr. Smith?

A. No, sir; we didn't.

Q. Now, directing your attention to the following day, will you tell us whether or not you had an occasion to go to the offices of the District Council on that day?

A. Yes, sir.

Q. What time of day?

[fol. 85] A. Oh, somewhere in the neighborhood of 8:00 o'clock, before or around 8:00.

Q. Whom did you see, if anyone?

A. Mr. Smith.

Q. Can you tell us whether or not you had a conversation with Mr. Smith?

A. Yes, sir.

Q. Who was present at that time?

A. Mr. Carter and myself, and there was also another fellow present. I don't know who he was.

Q. All right, Will you state for the record what was said during the course of that conversation?

A. Well, we told him we was back and gave him the letter again, and he said that we should have left the letter with him that afternoon and he would have checked it out, and so we asked him if he would give us a permit to go to work, or had he ever checked it out, and he said no, he hadn't checked it out.

Q. Can you recall whether or not there was anything said at that time with respect to Local 60?

A. He told us that we could leave our books there and clear in to Local 60, but if we did why he would recommend that they impose a fine upon us for soliciting work, being out of the district.

Q. Will you state for the record whether or not you received a work permit from Mr. Smith?

A. No, sir, I did not.

Q. Now, will you tell us whether or not on February 7th you had occasion to go to the offices of the International Brotherhood—strike that—the United Brotherhood of Carpenters & Joiners of America?

A. Yes, sir.

Q. What time of day was it when you went there?

A. It was after we left the District Council, in the neighborhood of, oh, 9:00 o'clock I would say.

Q. Whom did you see when you got there, if anyone?

A. Well, we saw Mr. Shuey, but we went to see Mr. Hutcheson, M. A. Hutcheson is who we went to see, but he wasn't in, he was in a meeting that morning, so his secretary said, so she referred us over to Mr. Shuey.

[fol. 86] Q. And will you state whether or not you had a conversation with Mr. Shuey on that occasion?

A. Yes, sir.

Q. All right. Will you tell us about that conversation?

A. Well, we gave him the letter and told him that we had been to the District Council and what had happened there and all, and asked him how about getting hold of the District Council and getting them to give us a work permit.

Q. Do you recall whether or not you told Mr. Shuey anything about being fined?

A. Yes, sir, we told him.

Q. What did you tell him about that?

A. We told him that we was told at the District Council that if we tried to clear in we would be fined, and he said by him being a member of the District Council he didn't think it would happen.

Q. Did he say anything about whether or not it could happen?

A. Well, he said it was possible.

Q. Do you recall anything further about that conversation?

A. Well, he told us we could go back to the District Council and leave our book, and could clear in the following week, clear our books in the following week.

Q. Do you recall anything further?

A. No.

Q. Do you recall whether or not anything was said by Mr. Shuey at that time about going to work at any place you wanted to?

A. Oh, he told us we couldn't come into this district and expect to go to work, because they had too many men loafing and said we were out-of-town men and we couldn't expect to come in the district and go to work.

Q. Now, following your conversation with Mr. Shuey, will you tell us whether or not you had occasion to talk to Mr. Wallace of the Mechanical Handling Systems?

A. Yes, sir.

[fol. 87] Q. And will you state the circumstances surrounding your conversation with Mr. Wallace?

A. Well, I told him what had happened, we couldn't go to work.

Q. How did you know you were talking to Mr. Wallace?

A. Because I asked for Mr. Roberts and he said, "No, this is Mr. Wallace."

Q. And will you tell us about that conversation?

A. Well, I told him what had happened, that we hadn't been able to get a permit or wasn't able to go to work

for him the next morning—that morning and all. And he asked if we would try to come back and we told him that we might the following week. He said if we come back to get hold of another fellow down there, Tommy Craig, and get him to come back and have him to clear in at the same time that we were supposed to clear in.

Q. And do you recall whether or not he said anything about your being employed?

A. Yes. We had a job if we come back.

Q. Now, directing your attention to the period of time following February, 1957, will you tell us whether or not you had any charges filed against you by the District, Indianapolis & Central Indiana District Council?

A. Yes, sir.

Mr. Rogers: Will you mark these for identification, please, as General Counsel's Exhibits Numbers 11 and 12?

(Thereupon, the documents above referred to were marked General Counsel's Exhibits Nos. 11 and 12 for identification.)

By Mr. Rogers:

Q. Now, Mr. Stevenson, I will hand you the document which has been marked for identification as General Counsel's Exhibit Number 11, and ask you to state what it is?

A. It is the charges that were preferred against me for soliciting work in this district, Indianapolis district.

[fol. 88]

Cross examination.

By Mr. McGowan:

Q. Mr. Stevenson, didn't you go up there to get a job as a foreman on that Mechanical Handling job?

A. Myself as a foreman?

Q. Yes.

A. No.

Q. It was just Mr. Carter wanted to be the foreman; is that it?

A. I don't know whether he wanted to be a foreman or not, but we went seeking employment.

Q. That's the job you asked for, wasn't it, a job as a foreman?

A. No.

A. We were told we had to go through Local 60 to go to work.

Q. Who told you that?

A. That is what Mr. Roberts told us.

RALPH R. SMITH, a witness called by and on behalf of the Respondents, being first duly sworn, was examined and testified as follows:

Direct examination.

Q. Do you ever write permits without being notified by the contractor that a job is available for a particular man?

A. No, sir.

Q. Regardless of whether it is an individual request, or whether it is just a request for a number of men?

A. No, I never write permits under those conditions.

Q. Is there any reason for that, any practical reason?

A. Actually, yes. The man pays for a permit, and when we write a permit we put a specific job on that. If there isn't any job why the man would be out his money that [fol. 89] he paid. We make no provision to refund money under those conditions.

Q. That's the procedure of the local unions under the District Council?

A. There are several local unions, and they form a district council, and that's the function of the District Council.

Q. Those matters are all handled through the District Council?

A. That's right.

Cross examination.

By Mr. Rogers:

Q. Mr. Smith, in the operation of the District Council and in its relationships with the local unions, the fact of the matter is that the District Council refers out the members of the various local unions; isn't that right?

A. I don't understand your question, by "refers out."

Q. You testified, as I recall, that work permits are granted only by the District Council, and that the District Council was made up of a group of local unions; is that right?

A. A group of representatives from local unions.

Q. And in the matter of referring persons for employment to various employers in the area, the District Council refers members of the various unions who are members of the District Council; isn't that right?

A. No, that isn't right.

Q. Who do they refer?

A. The District Council makes an attempt to supply men if they are called on to do that. However, each member does and each local union does that same function.

Q. Well, I thought you indicated by your testimony that Local 60 did no referring of its members for work?

A. Do you mean notify its members where work is available? Is that what you mean?

[fol. 90] Q. Giving them referral cards to various locals.

A. Oh, yes, each local union is in a position to give referral cards to its members to go to any job in the district.

Q. And is the District Council also authorized to give referral cards to any of the members of the local unions?

A. Certainly they are, if they have a job.

Q. So that Local 60 has authority to refer its members out to various employers through the area?

A. Every member can refer another member to a job, whether it is an officer or just an ordinary member.

Trial Examiner: Now, at the time material in this proceeding, which is in January and February of 1957, was

there a valid contract in effect between the Mechanical Handling Systems, Incorporated, and the Council?

The Witness: Mr. Roberts had agreed to abide by our contract, yes.

Trial Examiner: Well, was there a written contract, a signed written contract?

The Witness: I don't believe there was.

Trial Examiner: He had merely made a verbal agreement to abide by your contract?

The Witness: Yes.

Trial Examiner: And in your opinion was he agreeing to abide by a union-shop contract?

The Witness: Yes, sir, he was. That was a union-shop agreement.

Trial Examiner: But there was no written agreement?

The Witness: There was a written agreement that he had, but no member of his company had signed one for our Council.

Trial Examiner: I see. And when did he make this, Mr. Roberts, in behalf of the Mechanical Handling Systems Company? When did he make this oral agreement with you?

The Witness: The first time that I saw him.

Trial Examiner: And when was the first time that you saw him?

[fol. 91] The Witness: I believe he said three days after the job started.

Trial Examiner: Was the job already going, as far as the Mechanical Handling was concerned, when you saw him?

The Witness: Yes, sir; it was.

Trial Examiner: Did they already have men employed?

The Witness: Yes, sir; they did.

Trial Examiner: Members of Local 60, or any of the brotherhoods that are named in this proceeding?

The Witness: I believe that they had one man from 1102 in Detroit, was on the job.

Trial Examiner: Just one. But anyone from your jurisdiction here on the job?

The Witness: No. He hadn't hired anybody.

Trial Examiner: He hadn't hired anyone. And at that time when he had not hired anyone and merely had here a

man from Detroit who was a member of the craft, he made an agreement with you to abide by the local contract?

The Witness: Yes.

[fol. 95]

BEFORE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT No. 7

CONSTITUTION, BY-LAWS and TRADE RULES
of the

INDIANAPOLIS DISTRICT COUNCIL

531 E. Market St.

Indianapolis, Ind.

Instituted August 12, 1881

(Union Label)

Always Demand the Label

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

CONSTITUTION

ARTICLE I

General

Section A. This body shall be known as the District Council of Indianapolis and Vicinity, of the United Brotherhood of Carpenters and Joiners of America, and shall be composed of regularly elected delegates from the Carpenters, Mill and Factory Workers, Local Unions of the United Brotherhood located in Indianapolis and Vicinity. Its jurisdiction shall be that as agreed to in the Contract with the Contractors Association and as certified with the Bacon-Davis Division of the United States Department of Labor.

ARTICLE IV

Standing Committees and Their Duties

• • • • •

Sec. 5. A Clearance Card Committee elected as set forth in Section 1, shall examine all Clearance Cards and recommend their acceptance to the Local Unions, or may hold clearances up until the next regular meeting, for investigation before recommending their acceptance by a Local Union of the District Council. Any officer failing to send clearance card members to the District Council Clearance [fol. 96] Card Committee shall subject the Local to a fine of Five (\$5.00) Dollars for each offense.

• • • • •

ARTICLE VII

Finance

Section 1. The finances of this District Council shall be derived from the following sources; Sale of Working Cards and Permits. Difference in initiation fees, and Ten (\$10.00) Dollars of all initiation fees during an Organizational campaign and all Trade Rule infraction fines.

• • • • •

Sec. 3. This District Council shall issue a quarterly Working Card to the Secretary of each Local Union for each member in good standing in the Local Union as per last monthly report, together with such extra cards as may possibly be required in addition thereto, taking a receipt therefrom, and the Local Union shall be held strictly accountable therefor. The District Council shall have full and complete control over the Working Cards at all times and under all conditions and may at any time, of itself or by its Business Agent, revoke the privileges of the card at its next meeting, together with a full report of the case, and no member shall have or be held to have any redress except from this Council. • • •

• • • • •

Sec. 4. Members coming into this district are required to procure a District Council Working Card and permit,

before seeking employment. Failing to comply with this section, they will be fined not less than Ten (\$10.00) Dollars and must at all times be governed by the General Constitution and the Trade Rules of this District.

[fol. 97.]

ARTICLE VIII

Initiation Fees and Dues

Sec. 2. Dues shall be Three (\$3.00) Dollars per month for both Beneficial and Honorary Members of the Carpenters and Millmens Locals. Two Dollars and Twenty-five (\$2.25) Cents for Apprentices. All members of construction, whether following the trade actively or inactive, except pensioned members, shall pay Three (\$3.00) Dollars per quarter for their Working Cards, to the District Council. Millmen shall pay One Dollar and Fifty (\$1.50) Cents per quarter for their Working Cards.

ARTICLE XI

Job and Shop Stewards

Sec. 3. It shall be the duty of all Carpenters before going to work on any job under the jurisdiction of this District Council to present his Working Card and address to the Steward on said job, subject to a fine of not less than Five (\$5.00) Dollars.

ARTICLE XII

Foremen

Section 1. There shall be a Foreman of Carpenters on all jobs or buildings where there are three or more Journey-men Carpenters employed; the Foreman shall be a Carpenter, and a member of the United Brotherhood in good standing with the Indianapolis District Council. Any member acting in capacity of Foreman on any job shall receive

not less than Twenty-five (25c) Cents more per hour than the minimum rate of wages for a Journeyman. While all Foremen should prove their efficiency as such, they shall not rush, use abusive language, nor otherwise abuse a workman under their direction. A violation of this section is punishable by a fine of not less than Ten (\$10.00) Dollars.

[fol. 98] Sec. 3. All Foremen will be held equally responsible with the Steward for the violation of any of the Trade Rules of this Constitution.

ARTICLE XIV

Trade Rules

Sec. 10. No member shall be permitted to work with a member or ex-member who has been fined or suspended after the thirty (30) day limit for payment of fine has elapsed, unless such fine has been paid in full, under penalty of not less than Five (\$5.00) Dollars fine.

Sec. 21. Union Carpenters of this District shall not be allowed to work with non-union Carpenters without permission of the District Council under penalty of not less than Fifty (\$50.00) Dollars fine.

Approved by:

John R. Stevenson,
First General Vice-President.

August 17, 1954.

[fol. 99]

BEFORE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT NO. 8

CONSTITUTION, BY-LAWS and TRADE RULES
of theINDIANAPOLIS AND CENTRAL INDIANA
DISTRICT COUNCIL

1010 E. Market St.

Indianapolis, Ind.

Instituted August 12, 1881

(Union Label)

Always Demand the Label

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICA

[fol. 100]

CONSTITUTION

ARTICLE I

General

Section A. This body shall be known as Indianapolis and Central Indiana District Council, of the United Brotherhood of Carpenters and Joiners of America, and shall be composed of regularly elected delegates from the Carpenters, Mill and Factory Workers, Local Unions of the United Brotherhood located in Indianapolis and Central Indiana. The jurisdiction of the District Council shall be bounded by one-half ($\frac{1}{2}$) the distance between its affiliated Locals and the nearest non-affiliated Local Union.

ARTICLE IV

Standing Committees and Their Duties

Sec. 5. A Clearance Card Committee elected as set forth in Section 1, shall examine all Clearance Cards and recommend their acceptance to the Local Unions, or may hold clearances up until the next regular meeting, for investigation before recommending their acceptance by a Local Union of this District Council. Any officer failing to send clearance card members to the District Council Clearance Card Committee shall subject the Local to a fine of Five (\$5.00) Dollars for each offense.

ARTICLE VII

Finance

Section 1. The finances of this District Council shall be derived from the following sources: Sales of Working Cards and Permits. Difference in initiation fees, and Thirty-five (\$35.00) Dollars of all Initiation fees from Construction Local Unions, Ten (\$10.00) Dollars from Millmen Applications, and all Trade Rule infraction fines.

[fol. 101] Sec. 4. This District Council shall issue a quarterly Working Card to the Secretary of each Local Union for each member in good standing in the Local Union as per last monthly report, together with such extra cards as may possibly be required in addition thereto, taking a receipt therefrom, and the Local Union shall be held strictly accountable therefor. The District Council shall have full and complete control over the Working Cards at all times and under all conditions and may at any time, of itself or by its Business Agent, revoke the privileges of the card at its next meeting, together with a full report of the case, and no member shall have or be held to have any redress except from this Council.

Sec. 5. Members coming into this district are required to procure a District Council Working Card and permit, before seeking employment. Failing to comply with this section, they will be fined not less than Ten (\$10.00) Dollars and must at all times be governed by the General Constitution and the Trade Rules of this District.

ARTICLE VIII

Initiation Fees and Dues

Sec. 2. Dues shall be Three Dollars and Fifty Cents (\$3.50) per month for Beneficial and Honorary members of the Carpenters' and Millmen's Locals: Two Dollars and Fifty Cents (\$2.50) per month for Apprentices. In addition to the above-mentioned dues, any increase in wages will automatically raise the dues Ten (10c) Cents per month for all members in the District Council.

[fol. 102]

ARTICLE XI

Job and Shop Stewards

Sec. 2. It shall be the duty of all Carpenters before going to work on any job under the jurisdiction of this District Council to present his Working Card and address to the Steward on said job, subject to a fine of not less than Five (\$5.00) Dollars.

ARTICLE XII

Foremen

Section 1. There shall be a Foreman of Carpenters on all jobs or buildings where there are three or more Journey-men Carpenters employed; the Foreman shall be a Carpenter and a member of the United Brotherhood in good standing with the Indianapolis and Central Indiana District Council. Any member acting in capacity of Foreman

on any job shall receive not less than Twenty-five (25c) Cents more per hour than the minimum rate of wages for a Journeyman. While all Foremen should prove their efficiency as such, they shall not rush, use abusive language, nor otherwise abuse a workman under their direction. A violation of this section is punishable by a fine of not less than Ten (\$10.00) Dollars.

Sec. 3. All Foremen will be held equally responsible with the Steward for the violation of any of the Trade Rules of this Constitution.

ARTICLE XIV

Trade Rules

Sec. 10. No member shall be permitted to work with a member or ex-member who has been fined or suspended after the thirty (30) day limit for payment of fine has elapsed, [fol. 103] unless such fine has been paid in full, under penalty of not less than Five (\$5.00) Dollars fine.

Sec. 21. Union Carpenters of this District shall not be allowed to work with non-union Carpenters without permission of the District Council under penalty of not less than Fifty (\$50.00) Dollars fine.

Approved by:

John R. Stevenson,
First General Vice-President.

March 7, 1957.

[fol. 104].

GENERAL COUNSEL'S EXHIBIT No. 9

Constitution and Laws

of the

UNITED BROTHERHOOD OF CARPENTERS
AND JOINERS OF AMERICAAND RULES FOR SUBORDINATE
BODIES UNDER ITS JURISDICTION

Established August 12, 1881

Constitution as Amended
April 1, 1955

[fol. 104a]

CONSTITUTION

[fol. 105]

HOME

Section 5.

The Home for Aged Members shall be located at
Lakeland, Florida.

[fol. 106]

REVENUE

Section 17. The revenue of the United Brotherhood shall be derived from a per capita tax from all Local Unions on all members in good standing, also \$10.00 on each new member admitted in a Beneficial Local Union and \$5.00 on each new member admitted in Semi-Beneficial Local Unions (this fee does not apply to first year Apprentices), the cost of bonds on all subordinate officers, charter fees, rent of office building, interest on bank deposits, subscribers to and advertisements in the official Journal, clearance cards, fines, the sale of supplies and miscellaneous receipts.

JURISDICTION OF DISTRICT COUNCILS

- A** Section 26. Where there are two or more Local Unions located in one city they must be represented in a Carpenters' District Council, composed exclusively of delegates [fol. 108] from Local Unions of the United Brotherhood, and they shall be governed by such Laws and Trade Rules as shall be adopted by the District Council and approved by the Local Unions and the First General Vice-President. The General President shall have power to order such Local Unions to affiliate with such District Council, and to settle the lines of jurisdiction of such District Council, subject to appeal.
- B** District Councils may be formed in localities other than in cities where two or more Local Unions in adjoining territory request it, or when in the opinion of the General President the good of the United Brotherhood requires it. The District Council so formed shall be governed by the same General Laws governing District Councils in cities.
- C** District Councils shall have the power to make By-Laws, Working and Trade Rules for the government of the Local Unions and the members of the United Brotherhood working in their districts. Also, Laws governing strike and other donations except sick donations, which shall in no way conflict with the Constitution and Laws of the United Brotherhood, and must be adopted by a referendum vote of the members of the Local Unions affiliated with the District Council and approved by the First General Vice-President before becoming law, and their representation shall be according to membership.
- D** The jurisdiction of the District Council shall be as provided for by the Constitution and Laws of the United Brotherhood and named in their charter.
- E** District Councils shall have the power to hold trial for all violations by members or Local Unions and

impose such penalties as they may deem the case requires, subject to the right of appeal under Section 57. The decision of the General Executive Board on violations of Trade Rules is final. District Councils cannot debar their members from working for contractors or employers other than those connected with the Employers' or Builders' Association, nor shall they affiliate with any central organization whose Constitution or By-Laws conflict with those of the United Brotherhood.

F Local Unions other than those working on building material shall not have a voice, vote or delegate in any District Council of the building tradesmen, but may [fol. 109] establish District Councils of their own under By-Laws approved by the First General Vice-President.

G Examining Boards may be established by District Councils or Local Unions where no District Council exists. They shall examine candidates as to their qualifications for membership in the United Brotherhood and must report their findings on all applicants in writing. The examinations shall consist of a practical test in the branch of trade in which the applicant desires employment.

[fol. 110] **ADMISSION OF MEMBERS**

A Section 43. A candidate qualified and who desires to become a member of any Local Union of the United Brotherhood must fill out and sign the regular application blank in duplicate and have the same certified to by two members in good standing, as vouchers for the applicant's fitness to become a member. After the applicant has been initiated, the Financial Secretary shall send the original application to the General Secretary at the close of the meeting. The duplicate shall be filed away by the Recording Secretary for future reference.

[fol. 111]

- B** The application of the candidate (except first year apprentices) must be presented to the Financial Secretary with the full initiation fee, which shall be not less than Fifteen Dollars (\$15.00) and a sum equal to one month's dues, together with the proportionate part of the dues for the month in which the candidate is initiated, and before the candidate can be obligated, shall lay over one week for investigation, and shall be referred to a special committee of three, who shall in the meantime inquire into the candidate's qualifications to become a member and report at the next regular meeting of the Local Union, making such recommendations as they deem proper, or the candidate may be elected and initiated at the same meeting if the Investigating Committee reports favorably.

- C** Upon hearing the report of the committee the candidate shall be notified to appear before the members after which the candidate shall be voted or balloted for, and if elected to membership by a majority vote of members present shall be initiated. The Financial Secretary shall place the name of the new member on the books of the Local Union. The new member shall be supplied with a due book and a copy of the Constitution and Laws of the United Brotherhood and By-Laws and Working Rules of the district.

[fol. 112] FINANCES AND DUES

- A** Section 44. Beneficial and semi-beneficial members shall pay not less than Two Dollars (\$2.00) per month dues, Five Cents (5c) of which shall be paid by each of each members as subscription to the official monthly Journal, "The Carpenter," and shall be so applied. No officer or member shall be exempt from paying dues or assessments, nor shall the same be remitted or cancelled in any manner.

- B** Monthly dues shall be charged on the books on the first of each month, but a member does not fall in

arrears until the end of the month in which the member owes a sum equal to three months' dues.

C Each beneficial Local Union shall pay to the General Secretary \$10.00 on each new member admitted, excepting first year apprentices, also One Dollar and Twenty-five Cents (\$1.25) per month for each member in good standing. Ninety Cents (90c) of which shall be used as a fund for the general management of the United Brotherhood and payment of all death and disability donations prescribed by the Constitution and Laws of the United Brotherhood, together with all legal demands made upon the United Brotherhood. The balance of Thirty-five Cents (35c) together with moneys received from new members, to be placed in a special fund for "Home and Pension" purposes.

D Each semi-beneficial Local Union shall pay to the General Secretary \$5.00 on each new member admitted, also Sixty Cents (60c) per month for each member in good standing which shall be used as a fund for the general management of the United Brotherhood, and payment of all death donations prescribed by the Constitution and Laws of the United Brotherhood, together with all legal demands made upon the United Brotherhood.

[fol. 113] MEMBERS IN ARREARS

A Section 45. A member who owes the Local Union two months' dues shall be notified by mail at the last known address by the Financial Secretary during the third month of said delinquency that, if said arrearages are not paid before the last day of the third month the member will be suspended from benefits of death and disability donation, the right to a pension or admittance to the Home until the member squares up entirely all of the indebtedness (including dues for the month in which the member squares up the arrearages) and furthermore that the member will not be entitled to any benefits during the time of such arrearages or

for a three-month period from the date of squaring up same. A member in arrears must square up all arrearages in full within one year or stand suspended from membership.

- B** Members owing a Local Union a sum equal to six months' dues shall have their names stricken from the list of membership without a vote of the Local Union and such members shall be notified at the last known address by the Financial Secretary of the Local Union during the sixth month of said delinquency. An ex-[fol. 114] member desiring to rejoin the Brotherhood may be readmitted only as a new member, subject to such readmission fee as provided for in the By-Laws of the Local Union or District Council where application for membership is made. The Local Union readmitting the ex-member shall ascertain the reasons for having been dropped from membership and if dropped for non-payment of dues, shall collect an additional sum of Five Dollars (\$5.00) to be forwarded to the Local Union where membership was formerly held. If, however, said ex-member owed any fines or assessments at the time of being dropped from membership in the Brotherhood, the Local Union readmitting such ex-member shall collect the amount of the indebtedness and forward it together with the sum of Five Dollars (\$5.00) to the Local Union to which the ex-member formerly belonged.

CLEARANCE CARDS

- A** Section 46. A member who desires to leave the jurisdiction of the Local Union or District Council to work in another jurisdiction must surrender working card and present due book to the Financial Secretary, who shall fill out the clearance card and affix seal thereto. It shall be compulsory, except in case of strike or lockout, for the Local Union to issue said card, providing the member has no charges pending and pays all arrearages, together with current months' dues. Said Clearance Card shall expire one month from date of

issue. It shall be optional with the Local Union or District Council to issue Clearance Card in a jurisdiction where a strike or lockout is in effect. A member may leave such jurisdiction without a Clearance Card to seek work in another jurisdiction where no strike or lockout exists, provided the member presents a statement over the seal of the Local Union or District Council in which membership is held, showing that a strike or lockout is in effect in said jurisdiction. The member shall pay the prevailing charge for a Working Permit in the jurisdiction where work is secured.

B It is compulsory for the member to report and deposit the Clearance Card at the office of the District Council or Local Union where no District Council exists, before securing work, pending a meeting of the Local Union, and comply with all local Laws. And, in no case shall the Financial Secretary accept dues other than to secure Clearance Card from a member working in the jurisdiction of any other Local Union or District Council without the consent of such Local Union or District Council. It shall be the duty of the Financial Secretary accepting dues from a member for Clearance Card who is working in another jurisdiction [fol. 115] to immediately report same to the District Council or Local Union where no District Council exists under penalty of a fine of Five Dollars (\$5.00) for the first offense, Ten Dollars (\$10.00) for the second offense, and for the third offense suspension from all Local Office for a period of two (2) years.

C A member who desires to work in another jurisdiction and returns home daily, or who does not desire to transfer membership, shall before going to work, secure a Working Permit in writing from the Local Union or District Council in the jurisdiction where work is secured. The member shall pay for such Working Permit a charge of not less than Seventy-five Cents (75c) per month, nor more than the monthly dues of the Local Union or District Council, and if less than two years a member shall pay any difference in

initiation fee, and shall be subject to all local assessments levied exclusively for direct trade purposes by and for the use of the Local Union or District Council.

- D No Local Union shall have the right to collect dues again for the month paid on a Clearance Card. The Local Union issuing the card shall pay to the General Secretary the tax for said member for the month only in which the card is issued, and membership will remain in the Local Union issuing Clearance Card until Clearance Card is deposited in another Local Union, whereupon the member becomes a member of the Local Union wherein said card is deposited.

- G On entering a Local Union a member with a Clearance Card shall present same with Due Book to the President, who shall appoint a committee of three to examine the applicant and Due Book and report at once. If the Clearance Card and Due Book are found correct, and the identity of the member established to whom the Clearance Card is granted, the member shall be admitted to the Local Union as a member thereof, provided there is no strike or lockout in effect in that district.

[fol. 116]

- H On deposit of said card the Financial Secretary receiving it must sign and affix the seal to the coupon and forward coupon to the General Secretary at the close of the meeting as evidence of its deposit. The Local issuing the Clearance Card shall refund to the member all dues in excess of the current month. The Financial Secretary receiving the Clearance Card shall immediately report the same to the Financial Secretary issuing the Clearance Card under penalty of Five (\$5.00) Dollars fine.

[fol. 117] **MEMBERS ENTITLED TO
DONATION**

- A Section 48. The purpose of the funeral donation is to see that the deceased member is respectably interred; therefore, on the death of a member in good standing, the claim shall be paid to the estate of the deceased, or to the person presenting satisfactory proof that he or she has paid the funeral bill.
- B If a member in good standing dies without leaving any legal heirs, the Local Union shall see the deceased respectably interred. The officers or a committee of the Local Union shall attend the funeral and the United Brotherhood shall pay the funeral expenses, but in no case shall these expenses exceed the full amount of donation to which the member is entitled at time of death, nor shall the United Brotherhood be held liable for any further donations in the name of the deceased.
- C In the case of any member whose disability or death is caused by intemperance, improper conduct, or by accident or disease incurred previous to joining the United Brotherhood, or by being exposed to risks to which members in their work are not usually liable, neither the member nor any person acting for the member shall have any claims on the United Brotherhood.
- D No claim for donation arising out of any sickness or accident occurring while a member is in arrears shall be allowed.

**BENEFICIAL MEMBER'S FUNERAL
DONATIONS**

- A Section 49. A beneficial member to be entitled to donations must be not less than seventeen and not over sixty years of age at the time of admission to membership, and, when the member joined, must have been in sound health and not afflicted with any disease or subject to any complaint likely to endanger the member's health or cause permanent disability.

B A beneficial member will be entitled to the donations as prescribed in the Constitution and Laws of the United Brotherhood; provided, the member is over one year a contributing or financial member in good standing and when owing a sum equal to three months' dues the member shall be debarred from all donations until three months after all arrearages are paid in full, including the current month.

C Donations for beneficial members between the ages of seventeen and fifty years shall be:

One year's membership	\$100.00
Two years' membership	200.00
Three years' membership	300.00
Four years' membership	400.00
Five years' membership or more	600.00

[fol. 118]

D A candidate between the ages of fifty and sixty years of age when admitted to membership shall be entitled to the donations on condition that they have been a member the required length of time and that they were in good health at the time of their initiation, and in good standing at the time of death, provided however, they are over two years contributing or financial members in good standing, and when owing a sum equal to three months' dues they shall be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made. They shall not be entitled to husband or wife funeral donations or disability donations.

E Donations for members admitted between the ages of fifty and sixty years shall be:

Two years' membership	\$ 50.00
Three years' membership	100.00
Five years' membership	150.00
Ten years' membership	250.00

HUSBAND OR WIFE FUNERAL DONATION

- A** Section 50. A member of a beneficial Local Union between the ages of seventeen and fifty at the time of admission to membership shall, on the death of the husband or wife, be entitled to the husband or wife funeral donation as prescribed in the Constitution and Laws of the United Brotherhood, on condition that the husband or wife was sound in health at the time of admission to membership; provided, however, that a member owing a sum equal to three months' dues, shall be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made.
- B** An applicant eligible to beneficial membership, if married, whose husband or wife is in ill health, may be admitted, but in the event of death shall not be entitled to the husband or wife funeral donation. Should the husband or wife be sick at the time of joining the Local Union, then said husband or wife shall, after they become well, be examined by a physician, who shall furnish a certificate of health to the Local Union.
- C** All rules and provisions as to health and conduct applying to a claim for a member's funeral donation shall apply to the claim for a husband or wife funeral [fol. 119] donation for one husband or wife only. If however, both husband and wife are beneficial members, in the case of death of either, the survivor shall not be entitled to any donations other than those specified in Section 49.
- D** The husband or wife funeral donation shall be:

One year's membership	\$ 50.00
Two years' membership	100.00
Three years' membership or more	150.00

DISABILITY DONATIONS

- A** Section 51. A member of a beneficial Local Union, not less than seventeen and not more than fifty years

of age at the time of admission to membership, and who is in good standing and becomes permanently disabled for life by accidental injuries received not less than one year after becoming a member; and is thereby totally incapacitated from ever again following the trade for a livelihood, shall be entitled to a disability donation as prescribed in these Laws provided, however, when the member owes a sum equal to three months' dues, the member shall be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made. Payment of disability donation shall relieve the United Brotherhood from any further obligation and upon the payment of the claim the Financial Secretary shall strike the member's name from the books, and such member shall be eligible for readmission in any Local Union of the United Brotherhood, but only as an honorary member.

- B A permanent disability claim must be filed with the General Treasurer within two years from the date of the accident. Failure to do so shall invalidate the claim.
- C Permanent disability shall consist of total blindness; the loss of an arm or leg, or both; the total disability of a limb; the loss of four fingers of one hand; or being afflicted with any physical disability resulting from accidental injuries.
- D Whenever such disability has occurred through actual negligence, or the use of alcoholic drinks on the part of the disabled member, such member shall not be entitled to donations.
- E In all claims for disability donations the claimant shall be carefully and thoroughly examined by two competent and reputable physicians selected by the Local Union, and they shall send a certificate in writing to the Local Union as to the nature and extent of the disability and their opinion whether the claimant

[fol. 120] is totally disabled for life within the meaning of this section. The expenses of said examination shall be paid by the Local Union and the report of said physicians shall be sent to the General Treasurer.

- F When a member in a beneficial Local Union, not less than seventeen and not more than fifty years of age at the time of admission to membership, who is in good standing, meets with accidental injuries which might totally and permanently disable the member from ever again following any branch of the trade for a livelihood, any member shall report the accident to the Local Union within thirty days from the date of the accident and the Local Union shall appoint a committee to visit the member and secure from such member a detailed statement in writing as to how, when, and where the accident happened, the names of witnesses, if any, and retain same on file pending possible future claim for disability donation. The amount of disability donations shall be computed from the date of initiation to the date of accident.

- G The disability donation shall be:

One year's membership	\$ 50.00
Two years' membership	100.00
Three years' membership	200.00
Four years' membership	300.00
Five years' membership or more	400.00

SEMI-BENEFICIAL MEMBER'S DONATION

- A Section 52. Candidates who are less than sixty (60) years of age when admitted to membership in a semi-beneficial Local shall be entitled to the donations provided for semi-beneficial members on condition that they have been members the required length of time, that they were in good health at the time of their initiation and in good standing at the time of death, provided, however, they are over two years contributing or financial members in good standing, and when owing a sum equal to three months' dues they shall

be debarred from all donations until three months after all arrearages are paid in full, which payment must include the payment of dues for the month in which the payment is made. They shall not be entitled to husband or wife funeral donations or disability donations.

B Semi-beneficial members' donations shall be:

Two years' membership	\$ 50.00
Three years' membership	100.00
Five years' membership or more	150.00

[fol. 121] **PRESENTATION AND
PAYMENT OF CLAIMS.**

- A** Section 53. When death or disability occurs, the person applying for donation shall present to the Local Union concerned a certificate of the facts from the attending physician, and, if approved by the Local Union, the same shall be forwarded by the Financial Secretary to the General Treasurer, with the claim certificate of the United Brotherhood, properly filled out, and shall send all other papers required.
- B** All death claims must be filed with the General Treasurer within six months from date of death, failure to do so shall invalidate the claim. If a claim is disapproved by the General Treasurer, the party or parties shall have the right to appeal to the General Executive Board any time within six months from the date of disapproval and, if still dissatisfied, shall have the right to appeal any time within two years from date of decision by the General Executive Board to the next General Convention.
- C** Upon receipt of a claim, the General Treasurer shall investigate the same and, if approved shall at once forward to the Financial Secretary a bank check or draft for the amount of the donation due and payable to the person entitled to receive it.
- D** Any officer, member or Local Union making use of improper means to obtain donations, or who shall make

false statements as to age or health, or knowingly present or sign any claim of a fraudulent character for donations, upon proof thereof, may be fined, suspended or expelled from the United Brotherhood.

HOME AND PENSION

- A Section 54. A member shall not be less than sixty-five years of age to be eligible to the Home or Pension.
- B A member shall hold continuous membership for not less than thirty years.
- C The traveling expenses of a member whose application for admittance to the Home has been approved by the proper authorities shall be paid by the Local Union in which membership is held.
- D Members not wishing to avail themselves of the privilege of entering the Home may apply for a Pension not to exceed \$15.00 per month, payable quarterly.
- E Members applying for the Pension must apply for same through the Local Union in which they hold membership on forms furnished by the General Office.
- F No pension will be paid until an application has been properly filled out by the Local Union in which applicant holds membership and same has been approved by the General President.
[fol. 122]
- G Payment of Pension will be made at the beginning of the calendar quarter following approval of the application.
- H A member who qualifies under Paragraphs "A" and "B" of this Section and who receives State aid in those states where the amount of Pension paid by the Brotherhood is deducted from the amount of State pension, shall apply through the Local Union for a paid-up life membership, thereby relieving the member from paying further dues, and the Local from paying per capita tax to the United Brotherhood.

[fol. 123] **GENERAL STRIKES AND
LOCK-OUTS**

- A** Section 59. Strikes inaugurated and conducted according to the following rules may be sanctioned by the General Executive Board and financial aid ex-
[fol. 124] tended to the extent that the General Executive Board deems adequate. All trade movements to be first submitted to the General Secretary.

[fol. 125]

- L** When financial aid has been granted by the General Executive Board to members on strike, the list of members on strike or locked out, must be submitted to the General Office before financial aid will be allowed by the General Executive Board. The list to be checked up with the membership records at the General Office, and it shall not be payable until the end of the second week, and then only for the second week, to such members as have been on strike or locked out for two full weeks in succession. Members in arrears [fol. 126] shall square up their arrearages out of the first strike payment. Only those members who are called out on strike or who are locked out shall be entitled to strike pay.

- M** The Treasurer of the District Council, or Local Union where no District Council exists, shall send promptly to the General Secretary at the close of each week a complete financial report, on forms furnished by the General Secretary, of all moneys paid from the funds donated by the General Executive Board. Members receiving strike pay must sign their names on form opposite the amount received and the forms must be countersigned by the Chairman and Treasurer of the Strike Committee and attested to by the Recording Secretary of the Local Union or District Council and have the seal affixed. During the continuance of the strike the Secretary of the Local Union or District Council, or the Secretary of the Strike Committee,

shall report at the close of each week to the General Secretary in detail all matters of interest pertaining to the strike. The General Executive Board shall not vote any additional appropriation until the provisions of this Section are complied with.

- N** In case of a strike or lock-out, where immediate aid is required, the General President, General Secretary and General Treasurer shall be vested with power to appropriate such sums as, in their judgment, they deem advisable to meet these particular demands, and until such time as the General Secretary can act upon the same through correspondence with the General Executive Board.
- O** The General Executive Board shall have power when satisfied from facts and information in their possession that support in a strike or lock-out should cease, to declare the same at an end so far as the financial aid of the United Brotherhood is concerned.
- P** In case of a general lock-out of members of the United Brotherhood in any locality, the Secretary of the District Council, or the Local Union where a District Council does not exist, shall immediately mail to the General Secretary a complete statement of the causes leading up to the lock-out. The General Secretary will submit the same to the General Executive Board, who may appropriate funds for support of the members involved. The rules governing the disbursement of funds appropriated for strikes shall govern all appropriations made by the General Executive Board for support of members locked out.

[fol. 127]

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1959—January Session, 1960

No. 12710

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Respondents.

On Petition for Enforcement of an Order of the National Labor Relations Board.

OPINION—January 22, 1960

Before Schnackenberg, Knoch and Castle, Circuit Judges.

Knoch, Circuit Judge. The National Labor Relations Board seeks enforcement of its Order against the three respondents, hereinafter called respectively: "Local 60," "the Council," and "the International."

The Board found that Mechanical Handling Systems, Inc., hereinafter called "the Company", maintained two agreements with the respondents. One was a master contract to which the International was a party. The other was an oral agreement to which Local 60 and the Council were parties.

[fol. 128] The Board found that both agreements operated to require union membership as a condition of employment in violation of Section 8(b)(2) and (1)(A) of the Na-

¹ The Council is composed of delegates from various locals in the area, including Local 60, which are affiliated with the International.

tional Labor Relations Act, as amended; and that enforcement of these agreements prevented the hiring of two specified employees.

The master contract provided:

We, the firm of Mechanical Handling Systems, Inc., Agree to recognize the jurisdiction² claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners.

The rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America applicable in Indianapolis, Indiana, thus incorporated by reference, appear in the constitution and trade rules of the Council. These provide (*inter alia*) that (1) union members may not work with members, or ex-members, who have been suspended or fined (until the fine has been paid) and may not work with non-members without permission of the Council; and (2) members must present working cards to the union steward on the job before going to work; members of foreign locals of this same Union coming into the area must secure working cards before seeking employment.

The Council obtains a part of its revenue from fees collected for cards and permits. The Council has the sole right to issue quarterly working cards to the locals for their members (and such extra cards as may be required) for all of which the local union is accountable to the Council. The Council has authority to revoke cards. The Council's constitution provides for a clearance card committee to examine all clearance cards and make recommendations to the local union regarding acceptance of such cards. The trade rules provide for a foreman of carpenters on all jobs where three or more journeymen carpenters are employed. The foreman must be a member in good stand-

[fol. 129] ing. He shares responsibility with the union steward for enforcement of the trade rules.

In his Intermediate Report, the Board's Trial Examiner had found the master contract to be illegal. No exceptions were filed to this finding by the respondents and the Board adopted that finding. However, the Board did not adopt the Trial Examiner's conclusion that no connection existed between the master contract and the oral contract (discussed below) to which the Company, the Council and Local 60 were parties.

On the basis of the above quoted provision of the master contract and the rules incorporated by reference, the Board found that the master contract provided such limitations on hiring as to establish the closed shop conditions outlawed by the Statute.

The Trial Examiner found further (and the Board adopted his finding) that an illegal oral agreement had been made. In January, 1957, the Company was installing conveyor equipment in the Ford Motor Company plant at Indianapolis. The superintendent in charge of the job agreed with the Council's President, the only person authorized to make contracts for the Council and for Local 60, that the Company would abide by the master contract; would hire all needed millwrights and carpenters through Local 60, employing only those who brought referral slips from the Local; and that wages and working conditions would be governed by the Council's current contract with the local Building Contractor's Association.

The Board concluded that this oral agreement was made to implement the master contract and was part of a single comprehensive plan to evade the statutory ban on closed shops. *The Marley Company*, 117 N.L.R.B. 107, 109, 110 (1957).

Hafford B. Carter and Elza Stevenson, who had worked for the Company in Louisville, Kentucky, were not members of Local 60, nor of the Council, but were members of other locals affiliated with the same International Union. They applied for employment with the Company at the Ford job and were sent to Local 60 for referral cards. Referral cards were denied them, although when the person in charge at the Council office telephoned the Company

[fol. 130] superintendent, the superintendent said that he would have work for these two men within two weeks. Later the Company superintendent told Carter that he wished both men to begin work the following day. The Company superintendent wrote the Council's President asking for work permits for these two men, but the permits were, nevertheless, refused. Neither man ever received a permit and neither was ever allowed to work on the Ford job.

Charges were filed with the Board on behalf of Carter against the International, the Council, and Local 60, and on behalf of Stevenson against the Council and Local 60. Thus no finding was made against the International as to discrimination with respect to Stevenson.

The Board's Order required all three respondents to cease and desist making or enforcing agreements which required union membership as a condition of employment; to reimburse all employees of the Company for dues, assessments, and permit fees illegally exacted under the illegal contracts with the Company; to make Carter whole for loss of earnings; and to make certain notifications and to post specified notices. Similar actions were required of the Council and Local 60 with respect to Stevenson.

Although none of the respondents did so, the General Counsel for the Board had filed exceptions to the Trial Examiner's Intermediate Report. Had no exceptions been filed, the Trial Examiner's Recommended Order would have become the Board's Order. The Trial Examiner, as indicated, had found no connection between the master contract and the oral contract. He had concluded that the International engaged in none of the unfair labor practices alleged in the complaints. Further he had recommended that Local 60 and the Council be required to make restitution only to Carter and Stevenson for loss of pay arising from the discriminatory refusal of employment.

The International filed a motion to dismiss the proceedings before the Board on the ground that the exceptions filed by the General Counsel on February 21, 1958, were not served on the International immediately as required by Section 102.46 of the Board's Rules and Regulations. The exceptions were due in Washington, D. C. on February 24, 1958. They were received by the Board in apt time.

[fol. 131] The Board found that the General Counsel had mailed copies to all three respondents on February 21, 1958, by certified mail, an approved mode of service under Section 102.46 and 102.89 of the Board's Rules and Regulations. Section 102.90 provides that the date of service is the day when the material to be served is deposited in the United States Mail. No signed receipt slip for the certified mail was returned to the General Counsel from the International, but certified mail receipt slips from Local 60 and the Council show timely receipt of the copies by them. All three respondents were represented by the same counsel in these proceedings. Later personal service was made on counsel for the International, which was accordingly given additional time to answer the exceptions so that it was in no way prejudiced. As the Board found neither prejudice to respondents nor lack of due process in the service of copies of exceptions, motion to dismiss was denied and the Board concluded that valid service had been made. We agree.

Respondents argue that the evidence fails to show any dues, assessments and fees exacted under the agreements found to be unlawful; that on the contrary, all such fees were paid voluntarily. However, in our opinion, the record does support the Board's finding that such fees were coerced in that there was present an implicit threat of loss of job if those fees were not paid. The rules of the Council and Local 60 provided for supervision on the job to prevent any but local union members in good standing from working. The three respondents had full control of employment of millwrights and carpenters on the Ford job, even to veto over the Company superintendent's wishes to hire two former employees, both members of other locals affiliated with the same International. The fact that a contrary inference was possible does not empower this Court to set aside the inference drawn by the Board. *Virginia Electric Company v. N.L.R.B.*, 319 U.S. 533, 542-543 (1943). Respondents argue that the affected employees were already union members when the agreements were made and hence could not have been forced to join by the agreements. They were, however, deprived of their right

to resign. The burden rested on respondents to show that even without the unlawful discrimination; the Company's [fol. 132] employees would have maintained their membership in Local 60. *N.L.R.B. v. Remington Rand, Inc.* (2 Cir., 1938) 94 F. 2d 862, 872, cert. den. 304 U. S. 576.

Contrary to respondents' contention, we find reimbursement of fees to be a proper and appropriate remedy to restore employees to the position they would have enjoyed but for the illegal practices. There is no showing that the Order represents any attempt to attain ends other than effectuation of the policies of the Act. *Virginia Electric Power Co. v. N.L.R.B.*, supra, 539, 540. The Board has wide discretion in ordering affirmative action against those found to have committed unfair labor practices. *Dixie Bedding Co. v. N.L.R.B.* (5 Cir., 1959) 268 F. 2d 901, 907; *N.L.R.B. v. Broderick Wood Products Co.* (10 Cir., 1958) 261 F. 2d 548, 559. The complex problem presented is broader than the interests of the named litigants. The rights of an indeterminate number of employees and of the public are involved.

Substantial evidence in the record as a whole supports the Board's findings and shows that the Board has directed a just and reasonable remedy under the circumstances herein. Other arguments advanced by respondents, not herein discussed in detail, have received careful examination in arriving at the conclusions expressed. The Board's petition for enforcement of its Order is granted.

[fol. 133]

IN UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
No. 12710

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Respondents.

Petition for Enforcement of an Order of the National Labor Relations Board.

JUDGMENT—January 22, 1960

This cause came on to be heard on the petition of the National Labor Relations Board for enforcement of its order entered December 15, 1958, respondents' answer to said petition, and the record from the National Labor Relations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the petition of the National Labor Relations Board for enforcement of its order of December 15, 1958, be, and the same is hereby, Granted, in accordance with the opinion of this Court filed this day.

[fol. 134]

[File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 12710

NATIONAL LABOR RELATIONS BOARD, Petitioner,

v.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO; and UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, AFL-CIO, Respondents.

DECREE—Filed February 15, 1960

Before: Schnackenberg, Knoch and Castle, Circuit Judges.

This Cause came on to be heard upon the petition of the National Labor Relations Board for the enforcement of a certain order issued by it against Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, their officers, representatives, agents, and assigns, on December 15, 1958. The Court heard argument of respective counsel on November 20, 1959, and has considered the briefs and transcript of record filed in this cause. On January 22, 1960, the Court, being fully advised in the premises, handed down its decision granting enforcement of the Board's order.

On Consideration Whereof, it is ordered, adjudged and decreed by the United States Court of Appeals for the Seventh Circuit that the said order of the National Labor

Relations Board in said proceeding be enforced, and that Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; Indianapolis and Central Indiana District Council, United Brotherhood of Carpenters and Joiners of America, AFL-CIO; and United Brotherhood of Carpenters and Joiners of America, AFL-CIO, their officers, representatives, agents, and assigns, abide by and perform the directions of the Board in said order contained.


Elmer J. Schnackenberg, Win G. Knoch, Latham
Castle, Judges, United States Court of Appeals
for the Seventh Circuit.

A True Copy:

Teste:

Kenneth J. Carrick, Clerk of the United States Court of
Appeals for the Seventh Circuit.

[SEAL]

 [fol. 135] Clerk's Certificate to Foregoing Transcript
(omitted in printing).

[fol. 136]

SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING CERTIORARI—June 27, 1960

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted. The case is transferred to the summary calendar and set for argument immediately following No. 929.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

No. **68**
246

JAN 1959

IN THE
Supreme Court of the United States
OCTOBER TERM, 1959

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND
CENTRAL INDIANA DISTRICT COUNCIL, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, AFL-CIO; AND UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO,

Petitioners

NATIONAL LABOR RELATIONS BOARD,

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

FRANCIS X. WARD
WILLIAM A. MCGOWAN
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STATUTES:

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1959

No.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND
CENTRAL INDIANA DISTRICT COUNCIL, UNITED
BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, AFL-CIO; AND UNITED
BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO,
Petitioners



NATIONAL LABOR RELATIONS BOARD,
Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT**

Local 60, United Brotherhood of Carpenters and
Joiners of America, AFL-CIO, Indianapolis and
Central Indiana District Council, United Brotherhood
of Carpenters and Joiners of America, AFL-CIO, and
United Brotherhood of Carpenters and Joiners of
America, AFL-CIO, pray that a writ of certiorari issue

to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on January 22, 1960.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 273 F. 2d 699 (*infra*, pp. 1a-7a). The decision and order of the National Labor Relations Board are reported at 122 NLRB No. 51 (R. 3-15).

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1960 (*infra*, p. 8a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, based solely upon a finding that employment at a construction job was by agreement limited exclusively to union members referred by a particular local union or district council, the Board may require that the unions refund to the employees "dues, non-membership dues, assessments, and work permit fees" received by the unions from the employees.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), provides in pertinent part that:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist

from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

STATEMENT

Mechanical Handling Systems, Incorporated, manufactures, designs, and installs conveyors and allied equipment. (R. 17). It has an agreement with petitioner United Brotherhood "to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners" (R. 18).

On January 4, 1957, Mechanical Handling began a job at the plant of the Ford Motor Company in Indianapolis (R. 19). Two or three days later a business representative of petitioner District Council visited the job (R. 19). The business representative and the employer's superintendent agreed to hire millwrights and carpenters upon referral from petitioner Local 60 (R. 19-20). In practice employment at the Ford job was secured solely through referral or clearance from Local 60 or the District Council (R. 20, 22, 26).

Two applicants for employment at the Ford job were members of another local union, located at Louisville, Kentucky, affiliated with United Brotherhood (R. 68, 78). Both had formerly worked for the employer at a job in Louisville (R. 69, 78). They travelled from Louisville to Indianapolis and applied for employment at the Ford job (R. 68-69, 79). The employer declined

to hire them because they were unable to secure referral from Local 60 or the District Council (R. 22-24). It appears that they were denied referral "because . . . too many men" were unemployed in the Indianapolis area and "we were out-of-town men and we couldn't expect to come in the district and go to work" (R. 86).

The Board found that petitioners "violated Sections 8(b)(1)(A) and 8(b)(2) of the Act in maintaining and enforcing an agreement which established closed shop preferential hiring conditions", and "by causing or attempting to cause the Company to refuse to hire" the two applicants (R. 8).¹ In addition to other relief the Board ordered that petitioners (R. 10-11):

Reimburse all employees of Mechanical Handling Systems, Incorporated, in the full amount for all monies illegally exacted from them provided, however, that this Order shall not be construed as requiring reimbursement for any such dues, non-membership dues, assessments, and work permit fees collected more than 6 months prior to the date of service of the original charge against each Respondent herein.

In explanation of the refund requirement, the Board stated that (R. 9):

Furthermore, as we find that dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.

¹ United Brotherhood was not found to have violated Section 8(b)(1)(A) and (2) by causing one of the two applicants to be refused hire because this applicant had not filed a charge against United (R. 8 and n. 2).

In addition, therefore, we shall order the Respondents, jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment. These remedial provisions, we believe, are appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.

The trial examiner had declined to recommend a refund order, stating that exaction of moneys was "not in any way proven"; he described the General Counsel's basis for requesting a refund as "merely . . . a shot gun blast aimed in the general direction of quarry hoping that game will be brought down" (R. 27).

The Court of Appeals enforced the refund requirement, stating that "we find reimbursement of fees to be a proper and appropriate remedy to restore employees to the position they would have enjoyed but for the illegal practices" (*infra*, p. 6a).

REASONS FOR GRANTING THE WRIT

1. The decision below is in conflict with decisions of the Courts of Appeals for the Second,² Third,³ Fifth,⁴ Ninth,⁵ and District of Columbia⁶ Circuits. In those

² *Morrison-Knudsen Co. v. National Labor Relations Board*, 45 LRRM 2876 (March 3, 1960); *Building Material Teamsters, Local 282 v. National Labor Relations Board*, 45 LRRM 2879 (March 1960).

³ *National Labor Relations Board v. American Dredging Co.*, 45 LRRM 2405 (January 8, 1960).

⁴ *National Labor Relations Board v. Local Union No. 85, Sheet Metal Workers' International Association*, 45 LRRM 2661 (February 11, 1960).

⁵ *Morrison-Knudsen Co. v. National Labor Relations Board*, 45 LRRM 2907 (February 19, 1960).

⁶ *Local 357, International Brotherhood of Teamsters v. National Labor Relations Board*, 45 LRRM 2752 (February 18, 1960).

cases, as here, the Board found, and the courts agreed,⁷ that employment was based on a discriminatory hiring procedure. In those cases, as here, the Board ordered the refund of union dues and fees to the employees subject to the procedure in reliance exclusively upon the finding that hiring pursuant to it was discriminatory. But in those cases, unlike here, the Courts of Appeals set aside the refund requirement.

The Third Circuit stated that reimbursement is "a windfall to the employees and an unjust penalty . . ." (45 LRRM at 2406). The Fifth Circuit stated that it was "punitive rather than compensatory" (45 LRRM at 2663). The District of Columbia Circuit stated that "it goes too far . . ." (45 LRRM at 2753). The Second Circuit stated that it was "unduly harsh and penal in nature" (45 LRRM 2878), "inappropriate and arbitrary" (*id.* at 2879), and entered "more or less routinely and with regular incantation of the same words . . ." (*id.* at 2882). And the Ninth Circuit stated that it "is punitive, penal, non-remedial and an unauthorized requirement of payment to third persons not shown to have been in any manner damaged by the asserted unfair labor practice" (45 LRRM at 2917).

2. The importance of the question is manifest. This Court heretofore granted the writ to review the question whether, based exclusively on a finding that a union shop agreement was originally executed at a time when the contracting union did not have a majority, the Board may require the employer and the union to reimburse the employees for the union dues

⁷ However, the Court of Appeals for the Ninth Circuit held that the evidence did not support a finding of a discriminatory hiring procedure, but concluded alternatively that even if it did, the omnibus refund order could not stand (45 LRRM at 2915).

and initiation fees remitted by the employer to the union pursuant to the individual check-off authorization of each employee; the period of the refund to run for the term of the original and all succeeding union shop agreements beginning six months preceding the filing of the charge. *Local Lodge No. 1424, International Association of Machinists, AFL-CIO v. National Labor Relations Board*, No. 44, October Term 1959, decision pending at this writing. In the instant case the Board does not even relate the refund of dues and fees to their collection pursuant to the terms of a union shop agreement requiring their payment.

In the current version of the refund remedy exemplified by this case, as the then General Counsel of the Board has explained, what the Board has done "was to extend the board reimbursement order, theretofore reserved for Section 8(a)(2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM 101, 102. In the Board's view nothing is relevant but the existence of a discriminatory hiring procedure. Given such a procedure, according to the Board, employees are "inevitably coerced" to pay moneys to the union; "the existence of an unlawful contract is sufficient in and of itself to establish the element of coercion"; the refund remedy is therefore without more "applicable to all closed shop and exclusive hiring agreements, . . . whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB No. 167, 44 LRRM 1138, 1139; see also, *Local 244, Motion Picture Operators Union*, 126 NLRB No. 46, 45 LRRM 1318. The irrelevance of "actual exaction" is a logical consequence of

the Board's view. For, as it has explained, the purpose of the current refund remedy is to provide "a deterrent" to violations and "an incentive" to compliance (*Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224):

... we believe that a mere cease and desist order will have little impact in an industry where illegal hiring practices are widespread. The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance.

The Board's rationale is at war with settled limitations upon its exercise of remedial power. A remedy must be, "adapted to the situation calling for redress" (*National Labor Relations Board v. District 50, United Mine Workers*, 355 U.S. 453, 463); "only actual losses should be made good" (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 198); the Board's "power to command affirmative action is remedial, not punitive" (*Consolidated Edison Corp. v. National Labor Relations Board*, 305 U.S. 197, 236); and "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act" (*Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 12). In the light of these limitations, the validity of the Board's widely-applied current version of the refund remedy, bottomed as it is exclusively upon the existence of a discriminatory hiring procedure, is at the least in serious doubt. To resolve this important and recurrent question, and to settle the conflict in the circuits, determination by this Court is required.

CONCLUSION

For the reasons stated this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioners.

April 1960. ©

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959 — JANUARY SESSION, 1960

No. 12710

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

v.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL IN-
DIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA, AFL-CIO; and
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, *Respondents*

**On Petition for Enforcement of an Order of the National Labor
Relations Board**

January 22, 1960

Before SCHNACKENBERG, KNOCH and CASTLE, *Circuit
Judges.*

KNOCH, *Circuit Judge.* The National Labor Relations Board seeks enforcement of its Order against the three respondents, hereinafter called respectively: "Local 60," "the Council," and "the International."

The Board found that Mechanical Handling Systems, Inc., hereinafter called "the Company", maintained two agreements with the respondents. One was a master contract to which the International was a party. The other was an oral agreement to which Local 60 and the Council were parties.

The Board found that both agreements operated to require union membership as a condition of employment in

¹ The Council is composed of delegates from various locals in the area, including Local 60, which are affiliated with the International.

violation of Section 8(b)(2) and (1)(A) of the National Labor Relations Act, as amended; and that enforcement of these agreements prevented the hiring of two specified employees.

The master contract provided:

We, the firm of Mechanical Handling Systems, Inc., Agree to recognize the jurisdiction claims of the United Brotherhood of Carpenters and Joiners of America, to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners.

The rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America applicable in Indianapolis, Indiana, thus incorporated by reference, appear in the constitution and trade rules of the Council. These provide (*inter alia*) that (1) union members may not work with members, or ex-members, who have been suspended or fined (until the fine has been paid) and may not work with non-members without permission of the Council; and (2) members must present working cards to the Union steward on the job before going to work; members of foreign locals of this same Union coming into the area must secure working cards before seeking employment.

The Council obtains a part of its revenue from fees collected for cards and permits. The Council has the sole right to issue quarterly working cards to the locals for their members (and such extra cards as may be required) for all of which the local union is accountable to the Council. The Council has authority to revoke cards. The Council's constitution provides for a clearance card committee to examine all clearance cards and make recom-

mendations to the local union regarding acceptance of such cards. The trade rules provide for a foreman of carpenters on all jobs where three or more journeymen carpenters are employed. The foreman must be a member in good standing. He shares responsibility with the union steward for enforcement of the trade rules.

In his Intermediate Report, the Board's Trial Examiner had found the master contract to be illegal. No exceptions were filed to this finding by the respondents and the Board adopted that finding. However, the Board did not adopt the Trial Examiner's conclusion that no connection existed between the master contract and the oral contract (discussed below) to which the Company, the Council and Local 60 were parties.

On the basis of the above quoted provision of the master contract and the rules incorporated by reference, the Board found that the master contract provided such limitations on hiring as to establish the closed shop conditions outlawed by the Statute.

The Trial Examiner found further (and the Board adopted his finding) that an illegal oral agreement had been made. In January, 1957, the Company was installing conveyor equipment in the Ford Motor Company plant at Indianapolis. The superintendent in charge of the job agreed with the Council's President, the only person authorized to make contracts for the Council and for Local 60, that the Company would abide by the master contract; would hire all needed millwrights and carpenters through Local 60, employing only those who brought referral slips from the Local; and that wages and working conditions would be governed by the Council's current contract with the local Building Contractor's Association.

The Board concluded that this oral agreement was made to implement the master contract and was part of a single comprehensive plan to evade the statutory ban on closed

shops. *The Marley Company*, 117 N.L.R.B. 107, 109, 110 (1957).

Hafford B. Carter and Elza Stevenson, who had worked for the Company in Louisville, Kentucky, were not members of Local 60, nor of the Council, but were members of other locals affiliated with the same International Union. They applied for employment with the Company at the Ford job and were sent to Local 60 for referral cards. Referral cards were denied them, although when the person in charge at the Council office telephoned the Company superintendent, the superintendent said that he would have work for these two men within two weeks. Later the Company superintendent told Carter that he wished both men to begin work the following day. The Company superintendent wrote the Council's President asking for work permits for these two men, but the permits were, nevertheless, refused. Neither man ever received a permit and neither was ever allowed to work on the Ford job.

Charges were filed with the Board on behalf of Carter against the International, the Council, and Local 60, and on behalf of Stevenson against the Council and Local 60. Thus no finding was made against the International as to discrimination with respect to Stevenson.

The Board's Order required all three respondents to cease and desist making or enforcing agreements which required union membership as a condition of employment; to reimburse all employees of the Company for dues, assessments, and permit fees illegally exacted under the illegal contracts with the Company; to make Carter whole for loss of earnings; and to make certain notifications and to post specified notices. Similar actions were required of the Council and Local 60 with respect to Stevenson.

Although none of the respondents did so, the General Counsel for the Board had filed exceptions to the Trial

Examiner's Intermediate Report. Had no exceptions been filed, the Trial Examiner's Recommended Order would have become the Board's Order. The Trial Examiner, as indicated, had found no connection between the master contract and the oral contract. He had concluded that the International engaged in none of the unfair labor practices alleged in the complaints. Further he had recommended that Local 60 and the Council be required to make restitution only to Carter and Stevenson for loss of pay arising from the discriminatory refusal of employment.

The International filed a motion to dismiss the proceedings before the Board on the ground that the exceptions filed by the General Counsel on February 21, 1958, were not served on the International immediately as required by Section 102.46 of the Board's Rules and Regulations. The exceptions were due in Washington, D. C. on February 24, 1958. They were received by the Board in apt time.

The Board found that the General Counsel had mailed copies to all three respondents on February 21, 1958, by certified mail, an approved mode of service under Section 102.46 and 102.89 of the Board's Rules and Regulations. Section 102.90 provides that the date of service is the day when the material to be served is deposited in the United States Mail. No signed receipt slip for the certified mail was returned to the General Counsel from the International, but certified mail receipt slips from Local 60 and the Council show timely receipt of the copies by them. All three respondents were represented by the same counsel in these proceedings. Later personal service was made on counsel for the International, which was accordingly given additional time to answer the exceptions so that it was in no way prejudiced. As the Board found neither prejudice to respondents nor lack of due process in the service of copies of exceptions, motion to dismiss was

dened and the Board concluded that valid service had been made. We agree.

Respondents argue that the evidence fails to show any dues, assessments and fees exacted under the agreements found to be unlawful; that on the contrary, all such fees were paid voluntarily. However, in our opinion, the record does support the Board's finding that such fees were coerced in that there was present an implicit threat of loss of job if those fees were not paid. The rules of the Council and Local 60 provided for supervision on the job to prevent any but local union members in good standing from working. The three respondents had full control of employment of millwrights and carpenters on the Ford job, even to veto over the Company superintendent's wishes to hire two former employees, both members of other locals affiliated with the same International. The fact that a contrary inference was possible does not empower this Court to set aside the inference drawn by the Board. *Virginia Electric Company v. N.L.R.B.*, 319 U.S. 533, 542-543 (1943). Respondents argue that the affected employees were already union members when the agreements were made and hence could not have been forced to join by the agreements. They were, however, deprived of their right to resign. The burden rested on respondents to show that even without the unlawful discrimination, the Company's employees would have maintained their membership in Local 60. *N.L.R.B. v. Remington Rand, Inc.* (2 Cir., 1938) 94 F. 2d 862, 872, cert. den. 304 U. S. 576.

Contrary to respondents' contention, we find reimbursement of fees to be a proper and appropriate remedy to restore employees to the position they would have enjoyed but for the illegal practices. There is no showing that the Order represents any attempt to attain ends other than effectuation of the policies of the Act. *Virginia Electric Power Co. v. N.L.R.B.*, supra 539, 540. The Board has wide

discretion in ordering affirmative action against those found to have committed unfair labor practices. *Dirie Bedding Co. v. N.L.R.B.* (5 Cir., 1959) 268 F. 2d 901, 907; *N.L.R.B. v. Broderick Wood Products Co.* (10 Cir., 1958) 261 F. 2d 548, 559. The complex problem presented is broader than the interests of the named litigants. The rights of an indeterminate number of employees and of the public are involved.

Substantial evidence in the record as a whole supports the Board's findings and shows that the Board has directed a just and reasonable remedy under the circumstances herein. Other arguments advanced by respondents, not herein discussed in detail, have received careful examination in arriving at the conclusions expressed. The Board's petition for enforcement of its Order is granted.

A true Copy:

Teste:

KENNETH J. CARRICK

*Clerk of the United States Court of
Appeals for the Seventh Circuit.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Chicago 10, Illinois

Friday, January 22, 1960

Before

Hon. ELMER J. SCHNACKENBERG, *Circuit Judge*

Hon. WIN G. KNOCH, *Circuit Judge*

Hon. LATHAM CASTLE, *Circuit Judge*

No. 12710

NATIONAL LABOR RELATIONS BOARD, *Petitioner,*

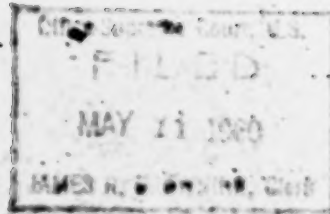
v.

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS
OF AMERICA, AFL-CIO; INDIANAPOLIS AND CENTRAL IN-
DIANA DISTRICT COUNCIL, UNITED BROTHERHOOD OF CAR-
PENTERS AND JOINERS OF AMERICA, AFL-CIO; and
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF
AMERICA, AFL-CIO, *Respondents.*

**Petition for Enforcement of an Order of the National
Labor Relations Board**

This cause came on to be heard on the petition of the
National Labor Relations Board for enforcement of its
order entered December 15, 1958, respondents' answer to
said petition, and the record from the National Labor Re-
lations Board, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by
this Court that the petition of the National Labor Relations
Board for enforcement of its order of December 15, 1958,
be, and the same is hereby GRANTED, in accordance with the
opinion of this Court filed this day.



No. ~~246~~ 68

In the Supreme Court of the United States

OCTOBER TERM, 1959

**LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS, ET AL.,
PETITIONERS,**

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
*Assistant General Counsel,
National Labor Relations Board,
Washington 25, D.C.*

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 846

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS, ET AL.,
PETITIONERS,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

The question presented is whether the Board, as a remedy for a hiring arrangement which unlawfully conditions employment upon union membership, may require that dues and other fees paid by the employees to the union under such arrangement be refunded to them. This remedy, known as the *Brown-Olds* remedy,¹ has been extensively used by the Board with respect to unfair labor practices of this type. The decision of the court below, sustaining such remedy, is in conflict with that of other Circuits, including the decision of the Court of Appeals for the District of

¹ It was first enunciated in *United Association, etc., and J.S. Brown-E. F. Olds Plumbing and Heating Corp.*, 115 NLRB 594 (1956).

Columbia Circuit in *Local 357, International Brotherhood of Teamsters v. National Labor Relations Board*.

In view of the importance of the question, the conflict of decisions, and the fact that the Board intends to file a petition to review the contrary decision in *Local 357*, the Board does not oppose the grant of the instant petition.

Respectfully submitted.

STUART ROTHMAN,
General Counsel,

DOMINICK L. MANOLI,
Associate General Counsel,

NORTON J. COME,
Assistant General Counsel,
National Labor Relations Board.

I authorize the filing of this memorandum.

J. LEE RANKIN,
Solicitor General.

MAY 1960.

FILE COPY

FILED

SEP 14 1960

NO. 68

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 60, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, ET AL., *Petitioners,*

v.
NATIONAL LABOR RELATIONS BOARD

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

J. ALBERT WOLL

General Counsel

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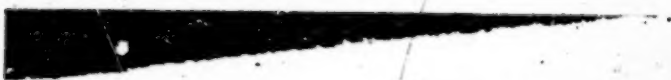
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

NO. 68

LOCAL 30, UNITED BROTHERHOOD OF
CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO, ET AL., *Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR
AND CONGRESS OF INDUSTRIAL ORGANIZATIONS
AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided in Rule 42 of the Rules of this Court.

The present case gives this Court an opportunity to appraise the so-called *Brown-Olds* remedy¹ of the National Labor Relations Board. Typically, this remedy requires the reimbursement of all union dues and fees collected from employees pursuant to a union-security or hiring hall arrangement which the Board determines to be illegal. The

¹ The name comes from *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), the first case in which the Board extended the mass refund remedy to a situation not involving a company-dominated or company-supported union.

practical implications of this new doctrine are staggering. Severe financial hardship, and in some instances financial ruin, is the imminent prospect for many locals affiliated with member unions of the AFL-CIO. Especially affected are unions engaged in the building and construction trades, and other unions operating hiring halls for employees. The AFL-CIO is therefore vitally interested in placing before this Court an outline of the scope of the *Brown-Olds* remedy and its impact on labor unions generally. Not all of the doctrine's ramifications are brought to the fore in this particular case. This is a further reason why the Federation has a special interest in demonstrating to the Court that the formulation and application of this remedy by the National Labor Relations Board, in this case and in many other similar cases for which the decision here might be controlling, is a patent abuse of administrative discretion.

ARGUMENT

The Board's *Brown-Olds* remedy poses two related, but logically distinct, issues: first, the extent of the power possessed by the Board to "support pivotal assumptions" with administrative "expertise alone,"² and secondly, the breadth of the discretion lodged with the Board to frame appropriate remedial orders. We submit that the *Brown-Olds* remedy stands condemned when viewed in either light.

The reimbursement remedy is not bottomed on reasonable inferences regarding the facts. It is based on a per se doctrine of inherent coercion, which is unsupported by and indeed contrary to historical and economic data, and which is accompanied by a blithe refusal by the Board even to consider direct evidence contradicting its fallacious assumptions. Furthermore, the remedy itself constitutes an abuse of the Board's discretion to frame appropriate orders. It amounts to a mechanical application of a formula

² See *Harrell v. FCC*, 267 F. 2d 629, 632 (D. C. Cir. 1959).

that fails to take account of the infinite complexities of situations in the labor-management field. Its operation is oppressive and capricious, causing only slight inconvenience to some unions and financial ruin to others. Finally, the remedy is essentially punitive rather than remedial, being likened even by Board personnel to a "meat-axe" or a "big stick" with which to enforce Board mandates on hiring halls.

I. The Board's Brown-Olds Remedy Is Based On An Unreasonable Inference That All Union Dues And Fees Collected Pursuant To An Illegal Union-Security Or Hiring Hall Arrangement Constitute Coerced Payments.

A. LACK OF REASONABLE BASIS OR OF HISTORICAL OR ECONOMIC DATA TO SUPPORT INFERENCE OF COERCION

We do not contest the existence of the Board's power to draw "reasonable inferences from proven facts." *Radio Officers' Union v. NLRB*, 347 U.S. 17, 49. We do not contest the Board's right to use its "cumulative experience" in fashioning a remedy, so long as there is exercised due "regard to circumstances which may make its application to a particular situation oppressive * * *." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349. At the same time we consider it beyond cavil that the Board cannot indulge in "mere conjecture" or "extravagant and unwarranted assumption." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 238. Board inferences are to be "reasonable," as this Court stated eight separate times in the course of four pages of its opinion in *Radio Officers*, *supra*, 347 U.S. at 49-52.

The legislative history of the Taft-Hartley Act emphasizes the concern of Congress that the courts should apply a check to any unreasonable inferences on the part of the Board. The role contemplated for reviewing courts under the 1947 amendments to section 10 of the National Labor

Relations Act³ was spelled out in the following terms in the House Conference Report:

"* * * they [the courts] will be under a duty to see that the Board observes the provisions of the earlier sections, that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence in making decisions."⁴

In *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), the Board ordered a union to reimburse all dues and assessments collected under a closed-shop contract. Although the evidence disclosed only one named individual who had been discriminated against, the Board justified its sweeping order covering all employees with the flat assertion: "Dues and assessments here collected constituted the price these employees paid in order to retain their jobs." *Id.* at 601. Primary reliance for this decision was placed on *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, where this Court approved a Board reimbursement order against a company in 1943.

Virginia Electric was a far different situation. Coloring every other aspect of the case was the fact that it involved a company-dominated union, "a type of organization," as

³ Sec. 10(e) of the original National Labor Relations Act, 49 Stat. 454, provided in part: "The findings of the Board as to the facts, if supported by evidence, shall be conclusive." Sec. 10(f) was similarly worded.

Sec. 10(e) of the National Labor Relations Act, as amended, 61 Stat. 148, 29 U.S.C. § 160(e), provides in part: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." Sec. 10(f) is similarly worded.

⁴ H.R. Rep. No. 510, 80th Cong., 1st Sess., p. 56.

expressly noted by this Court, "which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest." 319 U.S. at 544. The company-dominated union had entered a closed-shop and compulsory check-off arrangement with the company, whereby payments went "into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage." *Ibid.* In sum, the company had fashioned this creature; the company had controlled it, the company had dragooned the employees into membership, and the company had exacted tribute to it as the price for the employees' keeping their jobs.

Mr. Justice Frankfurter, concurring in *Virginia Electric*, underscored the need for evidence of coerced payments in order to support the refund order. He distinguished *Western Union Tel. Co. v. NLRB*, 113 F. 2d 992 (2d Cir. 1940), where Judge Learned Hand had refused to enforce a reimbursement order even against a company-dominated union, on the ground that in *Western Union* "there was no evidence that all those [employees] who asked to have their wages stopped, did so in any part because they were coerced." 319 U.S. at 545, quoting 113 F. 2d at 997. In *Virginia Electric*, on the other hand, observed Mr. Justice Frankfurter:

"... not only did it [the Company] foster that company union, it foisted membership in the union upon all its employees. The Board had a right to find that membership in the union, which the employees had no power to reject, equally denied the employees the power to reject the costs of that membership." 319 U.S. at 545. (Emphasis supplied.)

Thus, there were two salient factors in *Virginia Electric* which, taken together with the closed-shop and compulsory check-off arrangement, justified the Board's inference or conclusion that the employee payments were coerced:

1. The union was company-dominated. Congress, as the Court was aware, had recognized the evils of this institution. And labor history was replete with the shortcomings of company unions, with their impotence in times of stress and with their frequent betrayal of their members' interests.⁵ It would be wholly reasonable under the circumstances of *Virginia Electric* to infer that the employees would not have associated with such a caricature of a union had they had unfettered choice, and to infer instead that they were forced to pay dues to the organization which had been "feisted" on them.

2. The employees had no readily available means to reject the company-dominated union. Mr. Justice Frankfurter emphasized this fact in his concurrence. *Virginia Electric* was decided in 1943. Not until the Taft-Hartley amendments of 1947 was there a clear-cut method by which employees could secure "decertification" of a collective bargaining representative, or rescission of a collective bargaining representative's authority to make a union-security agreement with their employer.⁶

Neither of these salient factors is present in this case, or in the usual case in which the *Brown-Olds* remedy has been applied.

In none of the cases in which the AFL-CIO is interested, of course, is there a company-dominated union. In *Brown-Olds* itself, and in most of the cases applying the mass reimbursement remedy, including the present one, there has been no question about the legal status of the union as the representative of the majority of the employees on the job.

⁵ Millis and Montgomery, *The Economics of Labor: Organized Labor*, vol. III, pp. 879-886 (1945); Dulles, *Labor in America*, pp. 261, 277 (1949).

⁶ See § 9 (c) and (e) of the National Labor Relations Act, as amended, 61 Stat. 144-145, 29 U.S.C. §159 (c), (e); H.R. Rep. No. 245, 80th Cong., 1st Sess., p. 35.

Even in the rare cases involving minority or company-assisted unions, the employees at all times had it within their power, by virtue of the 1947 Taft-Hartley amendment, to revoke their union's authority to make a union-security agreement. These employees, like the employees in other *Brown-Olds* cases, were not lacking in the "power to reject" their union, as were the employees in *Virginia Electric*.

The short of the matter is that only one premise could conceivably support the Board's inference that *all* dues and fees collected pursuant to an illegal union-security or hiring hall arrangement amount to coerced payments even when collected by a free, vigorous union not dominated by any company. That premise, which the Board has never seen fit to articulate, is simply this: No working man would join a labor union and pay dues to it unless he was compelled to do so by a union-security agreement.

To buttress this "extravagant and unwarranted assumption," the Board (so far as we know) has never deigned to cite a single historical study or a single economic survey. Indeed it could not. The whole history of the American labor movement stands ready to refute any such contention. Working men join unions for mutual assistance, for

See, e.g., *Machinists Local 1124 v. NLRB*, 264 F. 2d 575 (D.C. Cir. 1959), *rev'd. on other grounds* 362 U.S. 411.

On workers' motives for organizing on both a local and national scale, see Commons and Associates, *History of Labor in the United States*, vol. I, pp. 169-184, 575-576 (1918), vol. II, pp. 43-48, 301-306 (1918), vol. IV, pp. 621-630 (1935); Millis and Montgomery, *The Economics of Labor: Organized Labor*, vol. III, pp. 354-359 (1945); Taft, *The A. F. of L. in the Time of Gompers*, pp. 1-13 (1957); Dulles, *Labor in America*, pp. 98-100 (1949). It is simply not the fact that a vague abstraction called a "union" coerces employees into membership, and tries to keep work from nonunion labor. Working men themselves have traditionally banded together and sought to prevent competition from cheap, substandard labor by means of the union shop or some analogous method for protecting their jobs and preserving craft standards. The experience of a

social reasons, and for such financial benefits as group insurance and pensions; but primarily they unite to achieve bargaining parity with their employers. In *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209, Chief Justice Taft succinctly put the matter in perspective:

"A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer."

Statistical data which the NLRB itself has published illustrate graphically the unreasonableness of the Board's inference of mass coercion. From 1947 to 1951, when the provision was repealed as unnecessary, a proviso to section 8(a)(3) of the National Labor Relations Act required specific authorization by employees before their collective bargaining representatives could enter into union-security agreements. The following is a tabulation of the results of the Board's union-shop authorization polls during this period:⁹

hundred years attests this. Commons, *supra*, vol. I, pp. 596-600. As late as the 1930s laboring men in many industries had to prove their steadfastness to the principles of organization by running a grim gauntlet of employer goon squads, labor spies, and economic reprisals. See Millis and Montgomery, *supra*, vol. III, pp. 604-612; Rayback, *A History of American Labor*, pp. 343-344 (1959).

⁹ See NLRB Thirteenth Annual Report, p. 111 (1948); NLRB Fourteenth Annual Report, p. 172 (1949); NLRB Fifteenth Annual Report, p. 235 (1950); NLRB Sixteenth Annual Report, p. 306 (1951).

Union-Shop Authorization Elections

Fiscal Year	Valid Votes	Votes for Union Shop	% for Union Shop
1947	1,629,330	1,534,980	94.2
1948	1,471,092	1,381,829	93.9
1949	900,866	805,189	89.4
1950	1,335,683	1,164,143	87.2

The inescapable conclusion is that the overwhelming majority of workers voluntarily embrace union conditions. In the light of historical experience and of the Board's own experience with these union-security authorization elections, any other inference, we submit, is patently "unreasonable" within the meaning of *Radio Officers*, *supra*, 347 U.S. at 48-52. The Board's finding that all employees in *Brown-Olds* cases have been coerced into paying dues is thus not supported by the "substantial evidence on the record considered as a whole" which is required by section 10(a) and (f) of the National Labor Relations Act.

Eight Courts of Appeals have had an opportunity to pass upon the *Brown-Olds* remedy, in cases where the union was not company-dominated or company-assisted but where there were merely alleged to be illegal hiring practices.¹⁰

¹⁰ A mass reimbursement remedy has been upheld in several cases involving company-assisted or minority unions. See *NLRB v. Broderick Wood Products Co.*, 261 F. 2d 548 (10th Cir. 1958); *Dixie Bedding Mfg. Co. v. NLRB*, 268 F. 2d 901 (5th Cir. 1959); *O'Neill International Detective Agency, Inc. v. NLRB*, 46 LRRM 2503 (3d Cir. June 22, 1960); *Machinists Local 1424 v. NLRB*, 264 F. 2d 575 (D.C. Cir. 1959), *revd. on other grounds* 362 U.S. 411; *NLRB v. Revere Metal Art Co.*, 46 LRRM 2121 (2d Cir. May 6, 1960). But these cases are not authority for imposing a *Brown-Olds* remedy where a majority union, unassisted by a company, is involved. Four of the Courts of Appeals which have enforced mass reimbursement orders in the company-assisted union situation have also had before them a *Brown-Olds* case involving a majority, unassisted union. And in every one of the latter instances, *Brown-Olds* was rejected. See note 11, *infra*, and related text. This is certainly not to say that in all cases of company-assisted unions a

Six Circuits—the Second, the Third, the Fifth, the Eighth, the Ninth, and the District of Columbia—flatly rejected *Brown-Olds* in such instances.¹¹ The First Circuit has refused to enforce *Brown-Olds* where the NLRB found a hiring arrangement illegal per se,¹² but has granted enforcement where some specific acts of discriminatory hiring were allegedly shown and where extraordinary circumstances militated for enforcement.¹³ The Seventh Circuit, in the instant case below, upheld *Brown-Olds* on the theory that once an illegal hiring arrangement was established, “[t]he burden rested on respondents to show that

mass reimbursement remedy should be applied. A more sophisticated view is that the Second Circuit, which even in cases involving company-assisted unions looks to see whether there is actually evidence of coercion of the employees before granting enforcement. Compare *NLRB v. Halben Chemical Co.*, 279 F. 2d 189 (2d Cir. 1960) (*Brown-Olds* denied), with *NLRB v. Revere Metal Art. Co.*, *supra* (*Brown-Olds* enforced). ☐

¹¹ *Morrison-Knudsen Co. v. NLRB*, 275 F. 2d 914 (2d Cir. 1960); *Teamsters Local 282 v. NLRB*, 275 F. 2d 909 (2d Cir. 1960); *NLRB v. American Dredging Co.*, 276 F. 2d 286 (3d Cir. 1960); *NLRB v. United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896 (3d Cir. 1960); *NLRB v. Sheet Metal Workers Local 85*, 274 F. 2d 344 (5th Cir. 1960); *NLRB v. Millwrights Local 2232*, 277 F. 2d 217 (5th Cir. 1960); *NLRB v. Operating Engineers Local 382*, 46 LRRM 2544 (8th Cir. June 29, 1960); *Morrison-Knudsen Co. v. NLRB*, 276 F. 2d 63 (9th Cir. 1960); *Teamsters Local 357 v. NLRB*, 275 F. 2d 646 (D.C. Cir. 1960), *cert. granted* 363 U.S. 837.

¹² *NLRB v. Carpenters Local 176*, 276 F. 2d 583 (1st Cir. 1960). The court looked on the “disgorgement order” as an “ex post facto penalty” when applied to conduct deemed unlawful only on the basis of the subsequently adopted *Mountain Pacific* doctrine. *Id.* at 586.

¹³ *NLRB v. Carpenters Local 111*, 278 F. 2d 823 (1st Cir. 1960). This case may be regarded as *sui generis*. The union was not represented by counsel before the Board and had failed to file exceptions to the Trial Examiner’s Report. The court concluded: “We think the correct rule is that in case of default an order should be enforced if it is not unreasonable on its face, and has some semblance of support on the findings below.” *Id.* at 825.

even without the unlawful discrimination, the Company's employees would have maintained their membership" in the union.¹⁴ This erroneously assumed that the *Brown-Olds* doctrine involves a rebuttable presumption. In reality, the Board views it as a "conclusive" presumption."¹⁵

Thus, in every one of the six Circuits where *Brown-Olds* has been assayed in its pure form, unalloyed with misconceptions about its scope or with other, extraneous considerations, the Board's doctrine has been rejected. And no Court of Appeals has approved it, absent such misconceptions or other special factors. The latest Circuit to register its position, the Eighth, summed up the tenor of prior decisions as follows:

"Primarily, a determination of the coercive nature of the payments to the union must be reached upon facts which lend support to a reasonable inference of such coercion. This requires a showing that the receipt of funds was directly related to the unlawful practice. . . . In cases which refused enforcement of the broad remedy, the courts found that there was no direct relation between the illegal act and the collection of fees, or that the evidence in some other way demonstrated lack of coercion, or failed to furnish a basis for a reasonable inference of such coercion." *NLRB v. Operating Engineers Local 382*, 46 LRRM 2544, 2548 (8th Cir. June 29, 1960).

B. THE BOARD'S IRREBUTTABLE INFERENCE; THE DOCTRINE OF PER SE COERCION

The Board has not rested content with drawing the unreasonable inference that all employees in *Brown-Olds* situations have been coerced into paying dues. It has pro-

¹⁴ *NLRB v. Carpenters Local 60*, 273 F. 2d 699, 703 (7th Cir. 1960).

¹⁵ See *NLRB v. United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896, 902 (3d Cir. 1960); Part B, *infra*.

ceeded to amplify the doctrine in subsequent decisions, holding that an illegal hiring practice or unlawful union-security provision "inevitably coerced all employees * * * to become or remain members of the Union," *Saltsman Construction Co.*, 123 NLRB 1176, 1177 (1959), and "is sufficient in and of itself to establish the element of coercion in the payment of moneys by employees * * * whether or not proof of actual exaction of payments is established," *Nassau and Suffolk Contractors' Assn.*, 123 NLRB 1393, 1409 (1959).

This doctrine of per se coercion has been carried to its logical conclusion. In *United States Steel Corp. (American Bridge Division)*, 122 NLRB 1324 (1959),¹⁶ the Board applied the *Brown-Olds* reimbursement remedy against a union despite the fact that the remedy was never sought by the General Counsel at any stage of the proceeding and despite the fact that the Trial Examiner's Intermediate Report was favorable to the union. On April 3, 1959 the union filed with the Board, in NLRB Cases Nos. 4-CA-1514 and 4-CB-373, a motion to reopen the proceedings "to receive evidence as to employees who voluntarily paid dues and initiation fees to Respondent Union during the period in question and were not in fact required to do so in order to secure or retain employment with Respondent Company." (Motion for Modification, etc., para. 14.) On May 4, 1959, by direction of the Board, the Board's Executive Secretary entered an order denying the union's motion, "on the ground that nothing has been presented that was not previously considered by the Board." (Order Denying Motions, p. 2.)

The final step in this perversion of logic was taken in *Lummus Corp.*, 125 NLRB No. 107 (1959). Faced with

¹⁶ Enforcement of the *Brown-Olds* portion of the order was denied in *NLRB v. United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896, (3d Cir. 1960).

the threat of a *Brown-Olds* order, the union had made an offer of proof at the hearing before the Trial Examiner. The Intermediate Report described this offer as "primarily in the form of testimony of members of the Respondent [Union] and financial statements, to establish that . . . union members were not coerced by the unlawful contract but instead paid dues and other fees to the Local voluntarily" (Intermediate Report, August 10, 1959, NLRB Case No. 4-CB-384, mimeo. copy, p. 8.) Citing *Nassau and Suffolk* and *Saltsman* for the proposition that "an unlawful exclusive hiring contract inevitably coerces employees," the Trial Examiner rejected the proffered evidence. *Ibid.* (Emphasis in the original.) The Board affirmed.

The full dimensions of the *Brown-Olds* doctrine now stand revealed.¹⁷ Upon the *a priori* proposition that workers would not join unions but for the existence of union-security arrangements, a proposition plainly at variance with history and recent empirical data, the Board has erected a per se doctrine of "inevitable coercion" of dues payments. And it has insulated this jerry-built structure from any contact with the disturbing world of reality by refusing even to consider evidence which would contradict factually the conclusions reached through its unreasonable inferences.¹⁸

¹⁷ We of course realize that the Court will only decide this case on the record before it. The process of decision should be enhanced, however, by viewing this particular situation in its proper setting of general Board policy. Furthermore, the NLRB itself undoubtedly regards the *Brown-Olds* remedy as a definitive formula of general application. Thus it seems appropriate that the Court should be aware of the proportions this doctrine has assumed.

¹⁸ The Board has introduced inconsistency into its reasoning by allowing itself the luxury of contemplating at least a segment of reality in situations where such indulgence would not disturb its *a priori* rules for applying the *Brown-Olds* remedy. Thus, in *Anchorage Businessmen's Assn.*, 124 NLRB No. 72 (1959), the

No apology is made by the Board for this approach. In the brief for the NLRB filed in June, 1959 in *Teamsters Local 357 v. NLRB*, No. 14,794 (D.C. Cir.), it is stated:

"And, in any event, the propriety of the Board's reimbursement order manifestly is not defeated because some employees may have made these payments voluntarily. . . . For the Supreme Court has declared that where the 'inherent effect' of union or employer conduct is coercive, as here, not even the subjective evidence of employees to the contrary will avail the wrongdoer." (Brief for the NLRB, pp. 50-51.)

Board refrained from invoking the refund order where a union-security contract was invalid merely because of a technical violation of the filing requirements of section 9(f), (g), and (h) of the National Labor Relations Act. The Board said it would not require reimbursement for this reason, and for the additional reason that "all the pharmacists in the area had joined the Independent before the execution of the union security contract and therefore must be presumed to have paid the initial dues and fees voluntarily, rather than under the compulsion of such contract." 44 LRRM 1453, 1457.

Yet in *United States Steel Corp. (American Bridge Division)*, discussed *supra*, p. 12, the union sought in vain to reopen the proceedings with the averment, inter alia, "that many employees had paid dues in advance of their employment by Respondent Company in accordance with past practice extending over many years and for reasons other than to secure or retain employment with Respondent Company . . ." (Motion for Modification, etc., para. 12.)

And in *Saltsman Construction Co.*, 123 NLRB 1176-1177 (1959), the Board declared: "We do not agree [with the Trial Examiner] that the remedy of reimbursement should be limited to those employees who became members of the Union after beginning employment. . . . the illegal practice . . . inevitably coerced all employees . . . to become or remain members of the Union."

Perhaps not without significance as a key to the present Board's philosophy is the fact that, just two years before the Board initiated in *Brown-Olds* its doctrine of per se coercion of union dues payments, it repudiated a line of its own decisions which had held that employer interrogation of employees concerning their union affiliation or activities was per se unlawful. *Blue Flash Express, Inc.*, 109 NLRB 591, 593 (1954), expressly overruling *Standard-Coosa-Thatcher Co.*, 85 NLRB 1358 (1949).

Cited as a basis for this assertion are this Court's decisions in *Radio Officers' Union v. NLRB*, 347 U.S. 17, and *NLRB v. Donnelly Garment Co.*, 330 U.S. 219. We feel that these decisions, fairly considered, refute rather than support the Board's contentions.

In *Donnelly Garment* the Board had been instructed by a Court of Appeals to admit and consider testimony by a company's employees that they had voluntarily organized and joined a union which the Board had charged was company-dominated. After a painstaking examination, this Court concluded that the Board had in fact obeyed the mandate of the Court of Appeals, even though the Board was left still convinced that the union was company-dominated. At no point did this Court suggest that "subjective evidence" was not a factor. Indeed it expressly noted that it was "not called upon to lay down a general rule of materiality regarding such testimony." 330 U.S. at 231. And of course *Donnelly* involved the admissibility of testimony regarding a union alleged to be company-dominated.

Radio Officers, we grant, upholds the power of the Board to draw "reasonable inferences from proven facts," without the necessity in every instance of having "subjective evidence of employee response." 347 U.S. at 49, 51. But in *Radio Officers* the fact of discrimination had been proved. The inference discussed and approved by this Court related to the effect of this proven discrimination on the employees, namely, whether "encouragement or discouragement [of union membership] can be reasonably inferred from the nature of the discrimination." *Id.* at 51. In the *Brown-Olds* situation it is the very fact of coercion which is at issue. And nowhere in *Radio Officers* is there any indication that the Board is authorized to draw an inference of coercion in splendid disregard of proven fact. Nowhere is there any indication that the Board may make

such an inference irrebuttable by refusing even to consider proffered testimony in contradiction of it. Especially pertinent on this point are the words of Mr. Justice Frankfurter, concurring in *Radio Officers* in an opinion in which he was joined by Mr. Justice Burton and Mr. Justice Minton:

"But that should not obscure the fact that this inference may be bolstered or rebutted by other evidence which may be adduced, and which the Board *must* take into consideration. The Board's task is to weigh *everything* before it, including those inferences which, with its specialized experience, it believes can fairly be drawn." 347 U.S. at 56-57. (Emphasis supplied.)

The "reasonable inference" standard endorsed by the Court in *Radio Officers*, and supplemented by the view of the three concurring Justices that an inference is subject to rebuttal by other evidence, thus clearly stands athwart the headlong course of the Board's per se doctrine of mass coercion.

Per se doctrines of National Labor Relations Act violations are nothing novel. And neither is repudiation of them by this Court. In *NLRB v. American National Insurance Co.*, 343 U.S. 395, 409, the Court struck down the Board's attempt to brand an employer's bargaining for a management functions clause as "per se an unfair labor practice," where the evidence viewed as a whole did not show that the employer refused to bargain in good faith. The Court commented that "a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case." 343 U.S. at 410. This healthy skepticism about substituting per se doctrines for a considered evaluation of the facts in each case seems even more appropriate in instances involving fancied coercion of dues payments by all the employees in a bargaining unit.

II. The Board's Brown-Olds Mass Reimbursement Order Is An Inappropriate Remedy, Not Adapted To Particular Circumstances, Oppressive In Its Operation, And Not Calculated To Effectuate The Policies Of The Act.

A. OPPRESSIVE AND CAPRICIOUS OPERATION OF THE REMEDY

The Labor Board abuses its discretionary power in framing remedial orders unless they are "appropriate" and "adapted to the situation calling for redress." *NLRB v. District 50, United Mine Workers*, 355 U.S. 453, 458, 463; *NLRB v. Mackay Radio and Telegraph Co.*, 304 U.S. 333, 348. Accordingly, even assuming that the Board's underlying inferences supporting the *Brown-Olds* remedy were reasonable, it would still be necessary for the Board to justify the appropriateness of the remedy itself as a means of exercising its discretionary power under the National Labor Relations Act. Board orders cannot be applied "mechanically"; they must take "fair account . . . of every socially desirable factor in the final judgment." *Phelps-Dodge Corp. v. NLRB*, 313 U.S. 177, 198. With these fundamental principles set forth we will not burden the Court with a repetition of the legal arguments fully explored by the petitioners in their brief. We will confine our attention principally to data showing the oppressive and capricious operation of the *Brown-Olds* remedy.

As of August 1, 1959, nine months after the NLRB undertook full utilization of *Brown-Olds*, a mass reimbursement remedy had been applied in about thirty final orders issued by the Board.¹⁹ At that time the files of the AFL-CIO con-

¹⁹ This did not include any of the numerous Intermediate Reports in which Trial Examiners had recommended the imposition of the *Brown-Olds* remedy. Although the *Brown-Olds* case itself was decided in 1956, the remedy did not become one to be applied generally until November 1, 1958. This was the final deadline allowed unions and contractors by the Board's General Counsel to achieve conformity in their hiring arrangements with the standards

tained relatively detailed information regarding the estimated financial effect on eleven of the unions which had been subjected to this remedy. This supplied a sample of about one-third of the total. Since the intervening year has produced a continual round of vigorous and consistently successful attacks on *Brown-Olds* in the courts, with attendant variations from what would be the normal pattern of enforcement if the reimbursement remedy became accepted doctrine; no effort has been made to keep track of the effect of subsequent Board orders. The following is a tabulation of the estimated amounts involved in the eleven instances mentioned:

Brown-Olds Awards

Estimated Amount of Award ²⁰	Size of Union Treasury Affected.
<i>Unions with approximately 500 members or less</i>	
\$75,000	\$80,000
\$ 750	\$34,000
\$50,000	\$ 3,000
<i>Unions with approximately 500-1000 members</i>	
\$ 1,550	\$100,000
\$30,000-\$50,000	\$ 50,000
<i>Unions with approximately 1000-1500 members</i>	
\$282,000	\$155,000
\$5	"Very small"
\$300,000-\$400,000	(\$113,000 (cash)
	(\$425,000 (total assets)
<i>Unions with approximately 1500 members or more</i>	
\$15,000	\$60,000
\$ 7,000	(\$98,000 (cash)
\$ 6,000	(\$245,000 (total assets)
	\$96,000

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\$75,000	\$80,000
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\$ 1,550	\$100,000
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	(\$425,000 (total assets)

Unions with approximately 1500 members or more

\$15,000	\$60,000
\$ 7,000	(\$98,000 (cash)
\$ 6,000	(\$245,000 (total assets)
	\$96,000

The following is a tabulation of the relationship between the estimated amounts of these awards and the union treasuries affected:

Awards substantially greater than treasury	2
Awards approximately equal to treasury	3
Awards substantially smaller than treasury	5
Award of insignificant amount	1

11

Of the eight unions affected which have less than 1500 members, five of them are threatened with awards which would wipe out their treasuries and which in two cases would place them many thousands of dollars in debt. Two of the three unions having memberships of 500 or less are so affected. The three large unions with memberships of 1500 or more are severely inconvenienced but in no instance is their treasury wiped out. The impact of the *Brown-Olds*

enunciated by the Board in *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883 (1958). See letter of the NLRB's General Counsel, dated August 19, 1958 (5 CCH Lab. Law Rep. ¶50,103).

²⁰ In all of these cases there were either Motions for Reconsideration pending before the National Labor Relations Board or Petitions for Enforcement or Review pending in the courts. Consequently, the amounts of money which would be involved if the mass reimbursement orders should be enforced could only be estimated. The estimates were the best calculations possible on the part of union attorneys and officials on the basis of the formulas supplied by the Board or by its regional offices in compliance conferences.

The Board introduced the possibility of a vast multiplication of these sums in the future with its announcement of the following formula in *Nassau & Suffolk Contractors' Assn.*, 123 NLRB 1393, 1409 (1959): "In cases involving multi-employer contracts in which the contracting union and one or more employers are named respondent parties to the contract, the union's liability for reimbursement of sums unlawfully exacted also shall extend to all employees covered under such contract •••"

remedy, as might be anticipated, falls most heavily upon the smaller unions least able to sustain it.

In section 1, paragraph 3 of the National Labor Relations Act the Congress set forth as one of the findings upon which it grounded the policies and provisions of the Act:

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by . . . restoring equality of bargaining power between employers and employees."

Nothing could more effectively destroy the balance of bargaining power between employers and employees, expressly stated by Congress to be a fundamental purpose of the National Labor Relations Act, than the continued application of this pernicious Board doctrine which could easily strip of financial resources or drive deeply into debt nearly half the unions it affects. Seemingly forgotten has been the warning of this Court that the Board may not apply "a remedy it has worked out on the basis of its experience without regard to circumstances which may make its application to a particular situation oppressive and therefore not calculated to effectuate a policy of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 349.

The very range in the size of awards (from \$5 to \$300,000 or \$400,000) in these cases suggests one of the capricious aspects of the mechanical application of this massive refund remedy. Numerous factors having no intrinsic relationship to the supposed evil of the union-security provision or hiring practice sought to be eradicated will be decisive on the amount of the resulting *Brown-Olds* award. The same union-security provision or hiring arrangement will ordinarily be used by a union on a number of jobs in a particular locality. Yet the amount to be reim-

bursed in a given case will be determined by the duration of the particular job concerning which a complaint is issued, by the number of men working on that job, and by the length of time required to process the case through the Board and the courts.

Characteristic of the mechanical operation of the *Brown-Olds* remedy is the Board's failure to take any account of the legality of union-shop provisions under the proviso to section 8(a)(3) of the National Labor Relations Act. Under this proviso, in all states not having "right-to-work" laws, a legitimate collective bargaining representative can enter into an agreement with an employer requiring union membership as a condition of employment after the thirtieth day following the beginning of employment. Accordingly, even assuming arguendo that an employee is coerced into joining a union by a closed-shop provision or discriminatory hiring practice, the union "[a]t most . . . may have collected only 1 month's dues in excess of those to which it was equitably entitled"²¹ under a valid union-security provision. So far as the men on the job are concerned—and these are the only ones covered by the refund order—this is realistically the sole injurious effect of a closed-shop arrangement. The Board utterly refuses to face up to this fact. It imposes the *Brown-Olds* remedy so as to require the reimbursement of all dues collected from the beginning of employment (insofar as the six-month limitations period allows) until the end of the job.

A further capricious effect of this doctrine has been described by a Board Trial Examiner even while utilizing it:

²¹ Board Member Peterson, dissenting in *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 607 (1956). If no union shop or no union at all is what the employees want, a deauthorization or decertification petition is always available. See note 6 and related text, *supra*, p. 6.

"*Brown-Olds* is a meat-axe remedy applied in meat-axe fashion. . . . inequities are inherent in applying *Brown-Olds*. One of these is that it is left to the charging party to determine whether all or only one or more of equally guilty contracting parties will be held liable for reimbursement." ²²

The nature of this particular problem is strikingly illuminated by a trio of charges involving the International Typographical Union. In *News Syndicate Co., Inc.*, 122 NLRB 818 (1959),²³ discrimination was alleged by two employees, one at the New York Daily News and the other at the Wall Street Journal. The first employee charged both the employer and the union while the second employee charged only the union. In *Honolulu Star-Bulletin, Ltd.*, 123 NLRB 395 (1959),²⁴ the employees alleging discrimination chose to charge the employer and not the union. In each instance, of course, the Board imposed the *Brown-Olds* remedy only against the party which was charged. With financial disaster for a union, or even a marginal employer thus hinging on the caprice of the individual charging party, there is all the more reason to question whether a remedy of this nature can be said in any genuine sense to effectuate the policies of the Act.

²² *Ingalls Steel Construction Co.*, NLRB Case No. 15-CA-1174 (1959) (Intermediate Report, mimeo. copy, p. 10).

The AFL-CIO believes neither employees nor unions should be subjected to these unrealistic and oppressive refund orders. However, the Board has taken the pains to suggest in its brief in *NLRB v. News Syndicate Co., Inc.*, No. 25,496 (2d Cir.), that an employer on whom the remedy is imposed could have a claim over against the union. (Brief for the NLRB, p. 35, n. 27.)

²³ Enforcement denied in *NLRB v. News Syndicate Co., Inc.*, 279 F.2d 323 (2d Cir. 1960).

²⁴ Enforcement denied in *Honolulu Star-Bulletin v. NLRB*, 274 F.2d 567 (D.C. Cir. 1959).

B. PUNITIVE USE OF THE REMEDY

As we have already indicated, the Board's *Brown-Olds* remedy is based upon an unreasonable inference unsupported by and contrary to proven fact, and rendered irrebuttable by the Board's rejection of any offer of contradictory evidence. We have also demonstrated the oppressive and capricious effect of this remedy in actual operation. Why then has the Board increasingly resorted to its use?

We do not think that the Board can or will deny that the primary purpose of the *Brown-Olds* remedy is to enforce the Board's strictures on union-security and hiring hall arrangements. Specifically, its principal role is to enforce adherence to the three guarantees which, in *Mountain Pacific Chapter, Associated General Contractors*, 119 NLRB 883 (1958),²⁵ the Board declared would have to be explicitly included to make valid any agreements establishing exclusive referral systems.

²⁵ Enforcement denied in *NLRB v. Mountain Pacific Chapter, Associated General Contractors*, 270 F.2d 425 (9th Cir. 1959). The court declared it "patent that a contract which is fair on its face is not unlawful in and of itself simply because it does not contain clauses prohibitory of illegal action." *Id.* at 431. While upholding the Board's capacity "to say that it will give peculiar weight to certain evidence," the court refused to let the Board hold as a matter of law that a hiring hall contract "which omitted certain prohibitory stipulations was per se invalid and contrary to law." *Id.* at 432. The Court of Appeals in effect struck down the Board's attempt in *Mountain Pacific* to operate on the same basis on which it is trying to operate in the *Brown-Olds* situations, viz., on the basis of per se doctrines rather than reasonable inferences of fact. *Id.* at 429-432. This Court itself has noted that "the Board has no general commission to police collective bargaining agreements . . ." *Carpenters Local 1976 v. NLRB*, 357 U.S. 93, 108.

The Board has indicated that it will apply the *Brown-Olds* reimbursement remedy if a contract fails to meet the *Mountain Pacific* standards even though the contract is otherwise valid on its face and even though there has been no showing that the contract has

On February 7, 1958 the General Counsel of the Board frankly advised unions and contractors in a letter:

"The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements." (5 CCH Lab. Law Rep. ¶ 50,060.)

In an address at the Southeast Trade Exposition on March 21, 1959, the General Counsel expressly linked the *Mountain Pacific* doctrine to the *Brown-Olds* remedy, commenting:

"The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their col-

been discriminatorily enforced against any particular employees. *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB 1629 (1958), modified and enforced 275 F. 2d 646 (D.C. Cir. 1960); *News Syndicate Co., Inc.*, 122 NLRB 818 (1959), enforcement denied 279 F.2d 323 (2d Cir. 1960). Formerly, refund orders were entered by the Board only where specific individuals had been found to be coerced into paying dues and fees. See, e.g., *Teamsters Local 404*, 100 NLRB 801 (1952), enforced 205 F.2d 99 (1st Cir. 1953). In *Nassau and Suffolk Contractors' Assn.*, 123 NLRB 1393, 1409 (1959), the Board expressly overruled two of its prior decisions in holding that the reimbursement remedy "is applicable to all closed-shop and exclusive hiring-hall agreements, which do not provide the safeguards set forth in the *Mountain Pacific* decision (119 NLRB 883, 893) whether or not proof of actual exaction of payments is established."

Of the system, in itself, by which a union serves as the instrumentality for referring workers to prospective employers for jobs, the Court of Appeals for the Ninth Circuit in its *Mountain Pacific* decision said simply: "The hiring hall is legal and has always been held so." 270 F.2d at 429, citing *NLRB v. Swinerton*, 202 F.2d 511 (9th Cir. 1953), cert. den. 346 U.S. 814; *Eichleay Corp. v. NLRB*, 206 F.2d 799 (3d Cir. 1953); *Del E. Webb Construction Co. v. NLRB*, 196 F. 2d 841 (8th Cir. 1952); *Hunkin-Conkey Construction Co.*, 95 NLRB 433 (1951).

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Letter of General Counsel of August 19, 1958, 5 CCH Lab. Law Rep. ¶ 50,103 (old edition)	38
Levitan, Common Site Picketing in Construction, 46 LRR 138	19
National Labor Relations Board, Thirteenth Annual Report, 1948, p. 411	17
National Labor Relations Board, Fourteenth Annual Report, 1949, p. 172	17
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National Labor Relations Board, Sixteenth Annual Report, 1951, pp. 10, 306	17
Proceedings of the Twenty-Seventh General Convention of the United Brotherhood of Carpenters and Joiners of America, November 15-19, 1954, pp. 169, 178	31
Quinn, Prehire Problems in the Construction Industry, 48 Geo. L. J. 380 (1959)	22
S. Rep. No. 187, 86th Cong., 1st Sess., 28-29	4, 21

lective agreements and hiring practices to the requirements of *Mountain Pacific*. In this respect, the major spur has been the so-called *Brown-Olds* remedy. . . . *deterrence is the underlying consideration* . . . (Mimeo. copy, pp. 5, 8; emphasis supplied.)

At the Rutgers University Conference on September 30, 1958 the General Counsel picturesquely emphasized the punitive nature of the *Brown-Olds* remedy and the coercive use made of it by the Board:

" . . . this extraordinary remedy . . . demonstrates vividly the capabilities of administrative pressure and persuasion. . . . over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full. . . . President 'Teddy' Roosevelt . . . carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword,' and the results to date have been heartening." (Mimeo. copy, pp. 6-8.)

In *Lummus Corp.*, 125 NLRB No. 107 (1959), the Board itself was outspoken in commenting on its use of *Brown-Olds*:

"The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a *deterrent* to future violations but an *incentive* to future compliance." 45 LRRM 1223, 1224. (Emphasis supplied.)

Sharply contrasting with the decisions of the Board and the words of its General Counsel is the unqualified statement of this Court that the Board's "power to command affirmative action is remedial, not punitive." *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236; *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 12. In *Republic Steel*, as if anticipating the arguments advanced on behalf of the Board's policy of "deterrence" during the past three years, the Court supplied a blunt refutation:

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

—
No. 68
—

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND
CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTH-
ERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; and UNITED BROTHERHOOD OF CARPEN-
TERS AND JOINERS OF AMERICA, AFL-CIO,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

—
On Writ of Certiorari to the United States Court of Appeals for the
Seventh Circuit

—
BRIEF FOR PETITIONERS
—

OPINIONS BELOW

The opinion of the Court of Appeals is reported at
273 F. 2d 699 (R. 114-119). The decision and order
of the National Labor Relations Board are reported at
122 NLRB No. 51 (R. 3-15).

JURISDICTION

The judgment of the Court of appeals was entered on January 22, 1960 (R. 120). The petition for a writ of certiorari was granted on June 27, 1960 (R. 122), 363 U.S. 837. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, based solely upon a finding that employment at a construction job was by agreement limited exclusively to union members referred by a particular local union or district council, the National Labor Relations Board may require that the unions refund to the employees "dues, nonmembership dues, assessments, and work permit fees" received by the unions from the employees.

STATUTE INVOLVED

Section 10(c) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., Secs. 151, *et seq.*), provides in pertinent part that:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. . . .

"* * * it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." 311 U.S. at 12.

In striking down *Brown-Olds*, the Courts of Appeals have recognized the relevance of these words by this Court. Citing the quoted language from *Republic Steel*, the Third Circuit declared that "to order a union to reimburse dues which it would have collected even if it had not committed an unfair labor practice appears to be nothing more than a fine * * *. But a fine is clearly the imposition of a penalty and the Labor Board is not authorized to impose penalties." *NLRB v. United States Steel Corp. (American Bridge Division)*, 278 F. 2d 896, 900 (3d Cir. 1960). The Fifth Circuit remarked: "As a punitive measure the refund provisions of the Order should not be enforced." *NLRB v. Sheet Metal Workers Local 85*, 274 F. 2d 344, 347 (5th Cir. 1960). And the Ninth Circuit put it simply when it said that "reimbursing a lot of old-time union men could not be anything but a windfall to the employees and an unjust penalty * * *." *Morrison-Knudsen Co. v. NLRB*, 276 F. 2d 63, 76 (9th Cir. 1960).²⁶

In a word, the *Brown-Olds* remedy, both in its underlying assumptions and in its actual application, is opposed to reason, to history, to empirical data, to Congressional policy, and to the pronouncements of this Court.

²⁶ See also Simpson, "The Brown-Olds Dues Reimbursement Remedy," 45 *Va. L. Rev.* 1192, 1210 (1959), where it is concluded that *Brown-Olds* should be denied enforcement in cases in which dues payments are not coerced, since "in those cases the Board's order is not necessary to negate the effects of an unfair labor practice. It is a penalty imposed by the Board with the purpose of deterring the future execution of illegal union security agreements."

STATEMENT

Mechanical Handling Systems, Incorporated, manufactures, designs, and installs conveyors and allied equipment (R. 15). It has an agreement with petitioner United Brotherhood "to work the hours, pay the wages and abide by the rules and regulations established or agreed upon by the United Brotherhood of Carpenters and Joiners of America of the locality in which any work of our company is being done, and employ members of the United Brotherhood of Carpenters and Joiners" (R. 16).

On January 4, 1957, Mechanical Handling began a job at the plant of the Ford Motor Company in Indianapolis (R. 17). Two or three days later a business representative of petitioner District Council visited the job (R. 17). The business representative and the employer's superintendent agreed to hire millwrights and carpenters upon referral from petitioner Local 60 (R. 17-18).¹ In practice employment at the Ford job was secured solely through referral or clearance from Local 60 or the District Council (R. 18, 20, 24).

Two applicants for employment at the Ford job were members of another local union, located at Louisville, Kentucky, affiliated with United Brotherhood (R. 65, 66, 76). One of the two had been a member of some local union of United Brotherhood for fifteen years (Tr. 129-130).² Both had formerly worked for

¹ Section 8(f) of the National Labor Relations Act, enacted in 1959, validates in the building and construction industry entry into a prehire agreement, i.e., an agreement between an employer and a union entered into before the actual employment of the workers covered by the agreement (*infra*; pp. 19-21).

² The original transcript of record is^o before this Court and "Tr." refers to that part of it which has not been included in the printed record.

CONCLUSION

For the foregoing reasons and for the reasons stated in the brief for petitioners, the judgment of the Court of Appeals should be reversed with directions to set aside the order of the National Labor Relations Board.

Respectfully submitted,

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September 1960

SEP 15 1960

No. 68

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS AND
JOINERS OF AMERICA, AFL-CIO; INDIANAPOLIS AND
CENTRAL INDIANA DISTRICT COUNCIL, UNITED BROTH-
ERHOOD OF CARPENTERS AND JOINERS OF AMERICA,
AFL-CIO; and UNITED BROTHERHOOD OF CARPEN-
TERS AND JOINERS OF AMERICA, AFL-CIO.

Petitioners

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Writ of Certiorari to the United States Court of Appeals for the
Seventh Circuit

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the employer at a job in Louisville (R. 67, 76). They travelled from Louisville to Indianapolis and applied for employment at the Ford job (R. 66, 76-77). The employer declined to hire them because they were unable to secure referral from Local 60 or the District Council (R. 20-22). It appears that they were denied referral "because . . . too many men" were unemployed in the Indianapolis area and "we were out-of-town men and we couldn't expect to come in the district and go to work" (R. 84)³.

³ The constitution of petitioner District Council provides that "Members coming into this district are required to procure a District Council Working Card and permit, before seeking employment" (R. 90-91, 95, cf. R. 102-104). The practice apparently is, in the distribution of work "to local men over men coming in," that "they always give the local men preference . . . especially if work is hard to get" (R. 48). Apparently too, permits issued to "out-of-town members" have a 30-day duration, and "if there isn't plenty of work" at the end of the period "they don't renew them" (R. 48-49).

Section 8(f) of the National Labor Relations Act, enacted in 1959, states explicitly that a prehire agreement in the building and construction industry may provide for priority in opportunity for employment based upon length of service "in the particular geographical area." Labor-Management Reporting and Disclosure Act of 1959, Title VII, Sec. 705, P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519, 545. Section 8(f) also specifically confirms the validity in the building and construction industry of the contractual establishment of an exclusive referral system of employment operated by the union. In commenting upon this, the Senate and House Reports both state that "These provisions are not intended to diminish the right of labor organizations and employers to establish an exclusive referral system of the type permitted under existing law." S. Rep. No. 187, 86th Cong., 1st Sess., 28-29, in 1 Leg. Hist. LMRDA 424-425; H. Rep. No. 741, 86th Cong., 1st Sess., 20, in 1 Leg. Hist. LMRDA 778. What "existing law" permits is before this Court for decision in *Local 357, International Brotherhood of Teamsters v. National Labor Relations Board*, No. 64, October Term 1960.

Based on the most recent constitution, the monthly dues payable to the Local Union is \$3.50 (R. 95), and the initiation fee is \$125 (G.C. Ex. 8, Art. VIII, Sec. 1, p. 21). Lesser dues and fees are payable by apprentices (*ibid.*). Of the initiation fee, \$10 is remitted to United Brotherhood, and of the monthly dues, \$1.25 is remitted to United Brotherhood (R. 101). A part of the initiation fees and dues is also apparently remitted to the District Council (R. 94, G. C. Ex. 8, Art. VII, Sec. 2, p. 19). The cost of a "Working Permit," payable by a member working within the jurisdiction of a district council who has not transferred his membership to a local union of that council, is "not less than Seventy-five Cents (75¢) per month, nor more than the monthly dues of the Local Union or District Council ..." (R. 103), a sum he "pays for the services that this district gives him when he gets the permit card" (R. 48).

The Board found that petitioners "violated Sections 8(b)(1)(A) and 8(b)(2) of the Act in maintaining and enforcing an agreement which established closed shop preferential hiring conditions", and "by causing or attempting to cause the Company to refuse to hire" the two applicants (R. 6).⁵ In addition to other relief the Board ordered that petitioners (R. 8-9):

Reimburse all employees of Mechanical Handling Systems, Incorporated, in the full amount for

⁴ The full text of this exhibit is part of the record before this Court and references to it by exhibit number are to those parts not included in the printed record.

⁵ United Brotherhood was not found to have violated Section 8(b)(1)(A) and (2) by causing one of the two applicants to be refused hire because this applicant had not filed a charge against United (R. 6 and n. 2).

all monies illegally exacted from them provided, however, that this Order shall not be construed as requiring reimbursement for any such dues, non-membership dues, assessments, and work permit fees collected more than 6 months prior to the date of service of the original charge against each Respondent herein.

In explanation of the refund requirement, the Board stated that (R. 7):

Furthermore, as we find that dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.

In addition, therefore, we shall order the Respondents, jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment. These remedial provisions, we believe, are appropriate and necessary to expunge the coercive effect of Respondents' unfair labor practices.

The trial examiner had declined to recommend a refund order, stating that exaction of moneys was "not in any way proven"; he described the General Counsel's basis for requesting a refund as "merely . . . a shot gun blast aimed in the general direction of quarry hoping that game will be brought down" (R. 25).

The Court of Appeals enforced the refund requirement, stating that "we find reimbursement of fees to be a proper and appropriate remedy to restore em-

ployees to the position they would have enjoyed but for the illegal practices" (R. 119).

SUMMARY OF ARGUMENT

The Board's order requires that the union dues and fees be refunded to employees whose employment was subject to a hiring procedure found by the Board to be discriminatory. The refund order is based exclusively upon the finding of a discriminatory hiring procedure. The Board's major premise is that, but for the existence of the discriminatory hiring procedure, the employees would not have acquired or retained union membership, and hence would not have paid union dues and fees.

The Board's premise is fundamentally false. Employees join unions because a "single employee . . . [is] helpless in dealing with an employer. . . . Union . . . [is] essential to give laborers opportunity to deal on equality with their employer." *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209. Nothing justifies the different assumption upon which the Board predicates the refund order. It is a commonplace that the building and construction industry is highly unionized and has been for a long time. There is no evidence in this case that the carpenters and millwrights hired to work at the Ford job in Indianapolis were not part of the main stream of long-standing and voluntary union members traditional in the industry. They were all union members when employed. There is no evidence that any joined in contemplation of seeking employment at this job. For all the Board knows or cares they may all have been members for decades. Nor can the Board bridge the gap by arguing that, whatever the voluntary character

of their union membership when they were first hired to work at the project, the employees could not relinquish membership and retain their employment on the job, so that their retention of union membership during this period was coerced. Every reason legitimately stimulating voluntary membership before the job began would operate just as strongly while it lasted.

Since there is nothing to support the Board's assumption that union membership was involuntary, there is nothing to support its cognate assumption that the payment of union dues and fees was involuntary. Experience has demonstrated overwhelmingly that employees who join a union also willingly pay dues and fees to it. The truth is that the Board is indifferent to the actual voluntary character of the payments. As it states, a refund is due "whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409. And so the Board's refund order disregards the precept that "only actual losses should be made good" (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 198), and is infected with the vice that it leaves "to mere conjecture to what extent membership . . . was induced by any illegal conduct . . ." (*Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 238).

Nor is this all. The Board's indifference to the absence of "actual exaction" of union dues and fees is matched by its total obliviousness to the benefits received from the payments, the costs incurred in providing the services, and other cogent factors. The negotiation of an agreement costs money, as does its administration. Dues and fees go towards defraying

the cost. They do not repose in depositories. It may safely be assumed that a refund order requires the return of moneys much of which have already been expended to pay for services. Hence, to require the refund of dues and fees does not simply mean that the employees will have received the benefits of union representation without contributing to defraying their cost. The moneys for reimbursement must come from somewhere, and insofar as the unions are concerned, they must come from the dues and fees paid by other employees working on other jobs. What reimbursement comes down to, therefore, is that the employees who receive a refund will have the benefits they secured from union representation paid for by employees working elsewhere. Moreover, not only does the Board disregard past services, but to drain a union's treasury disables it from as effectively negotiating and administering future agreements, and prejudices as well its capacity to establish and maintain intraunion benefit programs.

The Board disregards all these factors presumably because they are irrelevant to the real reason which actuates its imposition of the refund requirement. The true thrust of the refund order is revealed in the Board's statement that "a mere cease and desist order will have little impact" and the "reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance." *Local 125, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224. This statement identifies the precise vice in the use to which the Board puts the refund order. It is patent that the Board is exercising punitive power, although its "power to command affirmative action is

remedial, not punitive." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 236. It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 10. And when the Board invokes the deterrent quality of the order, it suffices to say, with this Court, that "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act." That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Id.* at 12.

Of course nothing in this Court's decision in *Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533, supports the use to which the refund order is presently put. This Court decided that a refund order was within the Board's power and exercise of the power to require the return of dues and fees paid to a company-dominated union was within the Board's discretion. *Virginia Electric* and this case are thus poles apart. Requiring the refund of fees and dues paid to a company-dominated union in conjunction with its dissolution has nothing in common with ordering a refund of fees and dues paid to a union whose authority to exist and function and to represent employees is altogether unquestioned.

11
ARGUMENT

An Order Requiring the Refund of Union Dues and Fees to Employees, Based Exclusively Upon a Finding That Their Employment Is Subject to a Discriminatory Hiring Procedure, Is Invalid

In this case and in No. 85 the Board ordered the refund of union dues and fees to employees whose employment was subject to a hiring procedure found by the Board to be discriminatory.⁶ The refund order is based exclusively upon the finding of a discriminatory hiring procedure. Neither the actual voluntary character of the payments by the employees, nor the services rendered to them, nor any other factors are deemed relevant by the Board to the appropriateness of the refund order. According to the Board, given a discriminatory hiring procedure, employees are "inevitably coerced" to pay moneys to the union; "the existence of an unlawful contract is sufficient in and of itself to establish the element of coercion"; the refund remedy is therefore without more "applicable to all closed shop and exclusive hiring agreements, . . . whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409; see also, *Local 244, Motion Picture Operators Union*, 126 NLRB No. 46, 45 LRRM 1318. The irrelevance of "actual exaction" is a logical consequence of the Board's view. For, as it has explained, the purpose of the refund order is to provide "a deterrent" to violations and "an incentive"

⁶ In this case the order runs against the unions only. In No. 85 the order runs against the union and the employer (R. 42); the Board and the employer in No. 85 entered into a stipulation providing that enforcement of the order against the employer would abide the outcome of judicial review of the order against the union.

to compliance (*Local 425, United Association*, 125 NLRB No. 107, 45 ERRL 1223, 1224):

... we believe that a mere cease and desist order will have little impact in an industry where illegal hiring practices are widespread. The reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance.

Except for the court below, every Court of Appeals which has considered on its merits⁷ the validity of a refund order based on a discriminatory hiring procedure has disapproved it, including the Second.⁸

⁷ The refund order was before the First Circuit in two cases, but the ruling in neither instance reached the merits. In the first case, the court disapproved it as an ex post facto penalty because of its retroactive application to conduct not deemed unlawful when it took place. *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586. In the second case, the court enforced a refund order in the absence of exceptions to its recommendation in the trial examiner's intermediate report. *National Labor Relations Board v. Local 111, United Brotherhood of Carpenters*, 278 F. 2d 823.

⁸ *Morrison-Knudsen Co. v. National Labor Relations Board*, 275 F. 2d 914, 917-918, certiorari pending, No. 120, October Term 1960; *Building Material Teamsters, Local 282 v. National Labor Relations Board*, 275 F. 2d 909, 911-913.

Third,⁹ Fifth,¹⁰ Eighth,¹¹ Ninth,¹² and District of Columbia Circuits.¹³ The tenor of judicial evaluation of the order is readily discernible. The Second Circuit stated that it was "unduly harsh and penal" (275 F. 2d at 917), "inappropriate and arbitrary" (*id.* at 918), and entered "more or less routinely and with regular incantation of the same words . . ." (*id.* at 912). The Third Circuit stated that it "appears to be nothing more than a fine which, in this instance, is paid into private, rather than public, coffers" (278 F. 2d at 900). The Fifth Circuit stated that it is "a windfall to the employees and an unjust penalty to the Union" (277 F. 2d at 222). And the Ninth Circuit stated that it "is punitive, penal, non-remedial and an unauthorized re-

⁹ *National Labor Relations Board v. United States Steel Corp.*, 278 F. 2d 896 (en banc), certiorari pending, No. 228, October Term 1960; *National Labor Relations Board v. American Dredging Co.*, 276 F. 2d 286, certiorari pending, No. 123, October Term 1960; *Lakeland Bus Lines v. National Labor Relations Board*, 278 F. 2d 888; *National Labor Relations Board v. Local 1566, International Longshoremen's Assn.*, 278 F. 2d 883, certiorari pending, No. 285, October Term 1960.

¹⁰ *National Labor Relations Board v. Local Union No. 85, Sheet Metal Workers Assn.*, 274 F. 2d 344, 346, certiorari pending, No. 89, October Term 1960; *National Labor Relations Board v. Millwrights' Local 2232*, 277 F. 2d 217, 222, certiorari pending No. 229, October Term 1960; *National Labor Relations Board v. Local Union No. 150, International Union of Operating Engineers*, 46 LRRM 2611, 2614-15 (July 12, 1960).

¹¹ *National Labor Relations Board v. International Union of Operating Engineers, Local 382-382A*, 46 LRRM 2544, 2548-49 (June 29, 1960).

¹² *Morrison-Knudsen Co. v. National Labor Relations Board*, 276 F. 2d 63, 73-76.

¹³ *Local 357, International Brotherhood of Teamsters v. National Labor Relations Board*, 275 F. 2d 646, 647, certiorari granted, No. 85, October Term 1960; *Puerto Rico S. Assn. v. National Labor Relations Board*, 46 LRRM 2496, 2498 (June 23, 1960).

quirement of payment to third persons not shown to have been in any manner damaged by the asserted unfair labor practice" (276 F. 2d at 76).

We turn to show that this judicial evaluation accurately appraised the refund order.

1. THE PREMISE OF THE REFUND ORDER IS THAT EMPLOYEES DO NOT JOIN UNIONS AND PAY DUES EXCEPT TO ESCAPE UNION DISCRIMINATION AGAINST THEM.

The Board justifies the refund of union dues and fees as an order appropriate to the finding of a discriminatory hiring procedure by a process of reasoning from an inference "piled upon an inference, and then another inference upon that. . . ." But for the existence of the discriminatory hiring procedure, the argument runs, employees would not be required to obtain or retain union membership in order to acquire or keep employment; given a discriminatory hiring procedure, therefore, employees become and remain union members to escape discrimination; since union membership was induced by fear of discrimination, the payment of dues and fees as an adjunct of union membership was likewise the product of such fear; and so, the argument concludes, the existence of the discriminatory hiring procedure "inevitably coerces employees to become or remain union members and to make payments to the union," and therefore the dues and fees should be refunded. *Local 125, United Association*, 125 NLRB No. 107, sl. op. pp. 2-3, 45 LRRM 1223. The Board's doctrine of "inevitable coercion" is so inexorable that an offer of proof that payments were voluntary, unrelated to the hiring procedure, is rejected. "We do not be-

¹¹ *Interlake Term Corp. v. National Labor Relations Board*, 131 F. 2d 129, 133 (C.A. 7).

lieve," states the Board, "that testimony by union members as to their joining or remaining members of the union is, in a context such as this, sufficiently persuasive to warrant a different result here." *Ibid.*¹⁵

1. *The basic fallacy:* The fundamental vice in the Board's position is that it assumes, in disregard of the whole history of the growth of the labor movement, that employees have no important incentive to join a union except to escape its presumed discrimination against them. Most of us have supposed that the reason for union membership is somewhat different. In 1921 this Court stated what was already then a commonplace (*American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 209):

[Labor unions] were organized out of the necessities of the situation. A single employee was helpless in dealing with an employer. He was dependent ordinarily on his daily wage for the maintenance of himself and family. If the employer refused to pay him the wages that he thought fair, he was nevertheless unable to leave the employ and to resist arbitrary and unfair treatment. Union was essential to give laborers opportunity to deal on equality with their employer. They

¹⁵ "One of the subsidiary attacks which the union makes on this order is that the Board refused to reopen the case and permit the union to offer testimony from employees that they were not coerced. Counsel for the Board, in argument here, says the reason for that refusal was that the evidence would be irrelevant. The union says that this shows that the Board's premise is that 'no working man would join a labor union and pay dues to it unless he was compelled to do so by a closed shop agreement or practice.' Counsel for the Board concedes that the presumption of coercion is a conclusive one once the unfair labor practice is shown." *National Labor Relations Board v. United States Steel Corp.*, 278 F. 2d 896; 899 (C.A. 3), certiorari pending, No. 228, October Term 1960.

united to exert influence upon him and to leave him in a body, in order, by this inconvenience, to induce him to make better terms with them. They were withholding their labor of economic value to make him pay what they thought it was worth.

In fostering union organization and collective bargaining, the Act is based on the premise that these are needed to redress the "inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association . . ." (Sec. 1, para. 2): Through union membership and collective bargaining employees seek and secure the benefits of employment standards "which reflect the strength and bargaining power and serve the welfare of the group." *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 338.

Experience has demonstrated overwhelmingly that employees who join a union also voluntarily pay union dues and fees to it. When the 1947 amendments to the Act were adopted, the proviso to Section 8(a)(3) was amended to provide that a union security agreement, obligating the employees covered by the agreement to pay union dues and initiation fees, could only be valid "if, following the most recent election held as provided in Section 9(c) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement. . . ." This requirement was repealed on October 22, 1951 (Public Law 189, 82d Cong., 1st Sess.), it having proved "burdensome and unnecessary." *National Labor Relations Board v. Gannett News Co.*, 197 F. 2d 719, 724 (C.A. 2).

affirmed, 347 U.S. 17. Its pointlessness was manifest from the results of the union-shop authorization polls conducted by the Board. "During the 4 years and 2 months, from 1947 to 1951, in which a union-shop authorization poll was required by the act before a valid union-shop agreement could be made, the Board conducted 46,119 such polls. Negotiation of union-shop agreements was authorized by vote of the employees in 44,795 of these polls. This was 97.3 percent of those conducted."¹⁶ For the fiscal year ending June 30, 1951, of 1,335,683 valid votes cast in such referendums, 1,164,143, or 87.2%, of the employees, voted in favor of the union shop.¹⁷ The same was true of the preceding years. In 1950, of 900,866 valid votes, 89.4% favored the union shop;¹⁸ in 1949, of 1,471,092 valid votes, 93.9% favored the union shop;¹⁹ in 1948, of 1,629,330 valid votes, 94.2% favored the union shop.²⁰

This overwhelming demonstration that employees voluntarily favor the adoption of union security agreements forever put the quietus to the notion that dues and fees are unwillingly paid. These agreements operate compulsively only as to that small group known as "free riders," i.e., employees who receive the benefits of union representation but are unwilling to contribute their share of financial support to such union. . . ."
Radio Officers' Union v. National Labor Relations Board, 347 U.S. 17, 41. Such agreements are the means by which a majority of the employees can re-

¹⁶ N.L.R.B., Sixteenth Annual Report, p. 10 (1951).

¹⁷ *Id.* at 306 (1951).

¹⁸ N.L.R.B., Fifteenth Annual Report, p. 235 (1950).

¹⁹ N.L.R.B., Fourteenth Annual Report, p. 172 (1949).

²⁰ N.L.R.B., Thirteenth Annual Report, p. 111 (1948).

quire a negligible minority to pay their own way. But that the vast majority willingly pays was demonstrated by their willing authorization of a contractual obligation to pay.

Consideration of circumstances particularly relevant to this case and to No. 85 emphasizes the voluntary nature of union membership and dues payment.

2. *The circumstances particularly relevant to this case:* The employer and the unions in this case are part of the building and construction industry and the Ford job at Indianapolis was a construction project. It is a commonplace that the building and construction industry is highly unionized and has been for a long time. As of 1927, "The combined membership of the seventeen international labor organizations [in the building and construction industry] in 1927 was more than 950,000 and at one time it had passed the million mark. In many large cities the building construction workers are, for all practical purposes, completely organized. In other cities their claim to an organized strength varying from 60 to nearly 100 percent of building workers, cannot be seriously disputed."²¹ A study of the extent of organization in the building and construction industry in sixteen cities in 1952 showed that, "In all sixteen cities surveyed in the summer of 1952, union strength in commercial, industrial, public, and semi public work was close to 100 per cent, with large apartment buildings only slightly weaker."²² A May 19, 1960 report of the Legislative Reference Serv-

²¹ Haber, *Industrial Relations In The Building Industry*, 325-326 (1930).

²² Haber and Levinson, *Labor Relations and Productivity In The Building Trades*, 35 (1956).

ice of the Library of Congress to members of Congress stated that:²³

The [building and construction industry] is highly organized and according to the Bureau of Labor Statistics about 2.3 million of the 2.6 million employees in the contract construction industry in 1958 belonged to these twenty unions. This estimate may, however, exaggerate union membership since it is based on union claims and also includes unemployed workers as well as some who may have retired but still are maintained on union rolls. (Directory of National and International Labor Unions in the U.S., Dec. 1959. Bureau of Labor Statistics. Bulletin No. 1267, Table 7, p. 12).

The National Bureau of Economic Research estimated that in 1953 union membership in the building and construction industry accounted for 84 percent of total employment. According to this study, union membership in 1953 accounted for 2,198,000 out of the total 2,622,000 persons engaged in the construction industry. (Leo Troy, Distribution of Union Membership Among the States, Occasional Paper No. 56, 1957, Tables 6, p. 24).

In 1959, in passing Section 8(f) of the National Labor Relations Act authorizing entry into prehire agreements in the building and construction industry, Congress acted in reliance upon the known high state of union membership in that industry. Section 8(f) supersedes the general rule that an employer and a union may not enter into an exclusive collective bargaining agreement covering a group of employees when that group of employees is rapidly expanding, so that the initial work force cannot truly represent more than

²³ Levitan, Common Site Picketing in Construction, 46 LRR 138.

a small fraction of the contemplated total. . . .²⁴ Congress eliminated that rule in the building and construction industry by providing in section 8(f) that "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in Section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement. . . ."²⁵ An important reason supporting the enactment of Section 8(f) was the practical assurance that because of the high degree of union membership in the industry the contracting union would in fact be the chosen representative of the present and future employees for whom the union acted. As the Senate Report states, "A substantial majority of the skilled employees in this industry constitute a pool of such help centered about their appropriate craft union. If the employer relies upon this pool of skilled craftsmen, members of the union, there is no doubt under these circumstances that the union will in

²⁴ *National Labor Relations Board v. Guy F. Atkinson Co.*, 195 F. 2d 141, 144 (C.A. 9), affirming in this respect, 90 NLRB 143, 145.

²⁵ See, 705(a), Title VII, Labor-Management Reporting, and Disclosure Act, 1959, P.L. 86-257, 86th Cong., 1st Sess., 73 Stat. 519, 545.

fact represent a majority of the employees eventually hired.²⁶

There is no evidence in this case that the carpenters and millwrights hired to work at the Ford job in Indianapolis were not part of this main stream of long-standing and voluntary union members traditional in the building and construction industry. They were all union members when employed. There is no evidence that any joined in contemplation of seeking employment at this project. For all the Board knows or cares they may all have been members for decades. "No effort was made to even show when these men joined the union. Practically all of them may have belonged for years. It would be surprising if many of these men had not been members of the union or some of its branches for many years. At any rate, nothing is shown in this record to negative that probable situation" *Morrison-Knudsen Co. v. National Labor Relations Board*, 276 F. 2d 63, 74 (C.A. 9).

The Board contends (*Local 125; United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224), and the court below agrees (R. 118-119), that whatever the voluntary character of their union membership when they were first hired to work at the project, the employees could not relinquish membership and retain their employment on the job, and so their retention of union membership during this period was coerced. This is as fanciful as the original assumption that the employees were coerced to become union members in the first place. An employee who voluntarily joins a union has no reason to leave it so long as he continues to

²⁶ S. Rep. No. 187, 86th Cong., 1st Sess., 28, in 1 Leg. Hist. LMRDA 424.

work in the trade in the absence of an intervening event which is forcefully disenchanting. The same inclination that prompted him to join would prompt him to remain. In fact the longer he is a member the less likely is it that he would cease to be. And union membership is so natural an attribute of the craftsman in the building and construction industry that what would be unnatural to him would be the thought of relinquishing it.²⁷ Finally, since the member is part of the class of employees whose employment on the job is protected from the competition of nonmembers, he would regard a system of employment based on union membership as a service to him rather than coercive of him.

In short, the Board's doctrine of "inevitable coercion" is a euphemism for the view that the absence of actual coercion is not material. In the Board's own words, dues and fees are to be refunded "whether or not proof of actual exaction of payments is established." *Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409.²⁸

²⁷ "[T]he building trade unions constitute the largest and in some cases, the only pool of available skilled labor." Quinn, *Prehire Problems in the Construction Industry*, 48 Geo. L. J. 380 (1959). "Many employers in the industry at one time were rank-and-file members, and although they left the ranks to become contractors, they still retained their union cards and followed the practices they had learned as union men." Apruzzese, *Prehire and the Local Building Contractor*, 48 Geo. L. J. 387, 394 (1959).

²⁸ The Board's departure from reality is vividly illustrated in the memorandum in opposition to certiorari in *National Labor Relations Board v. American Dredging Co.*, No. 123, October Term 1960. In that case, to support the refund order, the Board made its routine, mechanical finding that the employees were "inevitably" coerced. 123 NLRB 139, 142. The employees, however, apparently did not share the Board's impression of their sub-

3. *The circumstances particularly relevant in No. 85:* Consideration of the circumstances particularly relevant in No. 85 again demonstrates the total absence of a firm foundation for the refund order. In No. 85 the sole basis for the Board's conclusion that a discriminatory hiring procedure existed is that the agreement establishing the dispatching service for the hire of casual employees did not contain the three requirements devised by the Board as essential to the validity of a union's operation of an exclusive referral system of employment.²⁹ Had the agreement contained the three requirements no basis for a finding of a violation would exist. Consequently, the validity of the refund order depends upon whether it is appropriate to redress the omission of the three requirements from the agreement.

jugated state. "On May 5, 1960, the Board held a consent election in which 401 employees voted, i.e., approximately 90% of those eligible, and 401 employees voted to have the Union as their collective bargaining representative." Memorandum in Opposition, p. 5.

²⁹ As stated by the Board (*Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, 897, *renewed*, 270 F.2d 425 (C.A. 9)):

... we would find ... [a hiring hall] agreement to be nondiscriminatory on its face, only if the agreement explicitly provided that:

(1) Selection of applicants for referral to jobs shall be on a nondiscriminatory basis and shall not be based on, or in any way affected by, union membership, bylaws, rules, regulations, constitutional provisions, or any other aspect or obligation of union membership, policies, or requirements.

(2) The employer retains the right to reject any job applicant referred by the union.

(3) The parties to the agreement post in places where notices to employees and applicants for employment are customarily posted, all provisions relating to the functioning of the hiring arrangement, including the safeguards that we deem essential to the legality of an exclusive hiring agreement.

To justify the refund the Board argues from its presumption that a union will operate the referral system discriminatorily to its intermediate premise that employees therefore join the union in order to safeguard their opportunity for employment. Since, the argument goes on, the act of joining the union was induced by fear of discrimination, payment of union dues and fees as an adjunct of union membership was the product of that illegal inducement. The argument concludes that the dues and fees should therefore be refunded.

The threshold objection to this line of reasoning is that the Board ignores the logic of its original premise. If, as the Board presumes, the union will operate the referral system discriminatorily in disregard of the statute, what is there to say that the union will not operate it discriminatorily despite the incorporation of the three requirements into the agreement? Such incorporation would, under the Board's view, validate the operation of a referral system. Yet every step in the process of reasoning by which the Board would justify the refund is just as cogent whether the three requirements are in the agreement or not. The same supposed propensity to discriminate, the same supposed fear of it, and the same supposed consequent inducement to join would all still subsist. The Board can hardly justify a refund order, where the alleged wrong is based upon the omission from the agreement of the three requirements, upon a line of reasoning which would hold just as true even if the omission were rectified.

The second objection is that there is no evidence of a causal connection between operation of the dispatching service by the union and membership in

it. There is no evidence in the record as to the time that any casual employee joined the union. The agreement providing for the operation of the dispatching service was entered into on May 1, 1955 (R. 62). For aught that the record shows, every casual employee joined the union well before then, and well before the operation of any dispatching service. They surely did not all join on or after the commencement of the referral system of employment. But the Board assumes just that. For if the employees joined the union *before* the operation of the dispatching service began, there is no basis for the Board's assumption that the employees joined in order to protect their employment from discriminatory operation of the dispatching service. Membership which *preceded* the dispatching service could not have been caused by it. The Board assumes this critical fact—that membership followed rather than preceded the dispatching service—without an iota of evidence to support the assumption. Nor can the Board bridge the gap by arguing that, regardless of the voluntariness of the original inception of membership, continuance in membership was coerced by the inauguration of the dispatching service. Every reason legitimately stimulating voluntary membership before the beginning of the dispatching service would operate just as strongly afterwards (*supra*, pp. 21-22).

This returns us to the fundamental vice in the Board's position. The Board assumes that the casual employees had no important incentive to join the union except to escape its presumed discrimination against them. But there is no evidence to support an assumption that in this case the union membership of the casual employees was not part of the main stream of

willing participation in the labor movement. The union was one of fifteen local unions united to bargain collectively on an industry-wide basis with an association representing about one thousand employers (R. 55, 59-60; 62-66). Membership in the union contributed to the "strength and bargaining power and serve[d] the welfare of the group."³⁰ The Board cannot assume without evidence that the casual employees did not voluntarily join the union in order to be part of that group.

Finally, as the examiner stated, "No question is raised as to the Union's representative status . . ." (R. 49). This means that it is uncontested that the union is the free choice of a majority of the employees. Experience has demonstrated overwhelmingly that employees who choose to be represented by a union in collective bargaining also choose to pay union dues and fees to it (*supra*, pp. 16-17). Yet the Board states that the casual employees paid dues and fees to the union unwillingly. And it states this despite the fact that the union security provision of the agreement in this case was inapplicable to the casual employees. For that provision stipulates, as the law requires, that continued employment is conditioned upon union membership only "after thirty (30) days from the effective date of this Agreement, or after thirty (30) days from the date an employee is hired, whichever is later . . ." (R. 62). This provision can never be applied to a casual employee. His period of continuous employment with a particular employer never exceeds part of a week and customarily lasts only one day or part of a day (R. 9-10, 30-31); the casual employee

³⁰ *J. I. Case Co. v. National Labor Relations Board*, 321 U.S. 332, 338.

therefore never works "thirty (30) days from the date" he "is hired"; and hence the precondition to applicability of the union security agreement to him can never be realized. Thus the casual employee's payment of union dues and fees cannot even be said to have been contractually compelled. It is then surely fictive for the Board to say that the casual employees were "inevitably" coerced into paying dues and fees (R. 40).

4. *The upshot*: "Since only actual losses should be made good" (*Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 477, 198), the Board trips at the threshold in requiring the refund of dues and fees "whether or not proof of actual exaction of payments is established." *Local 128, International Union of Operating Engineers*, 123 NLRB 1393, 1409. To return a voluntary payment is not to make the employee whole but to make him the beneficiary of a windfall. And so the law has long established the rule that damages are not recoverable unless they are "the certain result of the wrong," "definitely attributable to the wrong. . . ." *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562. "Certainty in the fact of damage is essential." *Palmer v. Connecticut P. & L. Co.*, 311 U.S. 544, 561. See also, *Talon, Inc. v. Union Slide Fastener, Inc.*, 266 F. 2d 731, 736-737 (C.A. 9). No one "may properly seek to secure something from another without . . . demonstrating pecuniary loss springing from or consequent upon the unlawful act." *Beegle v. Thompson*, 138 F. 2d 875, 881 (C.A. 7), cert. denied, 322 U.S. 73. To refund dues and fees to an employee, for which he has received services, without a solid showing that he involuntarily paid

them, is not to make him whole but to enrich him unjustly.³¹

In short, as with any other remedial order, so with a refund order, it must be shown to justify it that the order eradicates "a consequence of the unfair labor practices found by the Board . . ." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 236. And, in this case and in No. 85, as in the generality of cases which these two typify, it simply does not stand established that the union membership of the employees, and their payment of dues and fees, were the consequence of the operation of a hiring procedure found by the Board to be discriminatory. It "is left to mere conjecture to what extent membership . . . was induced by any illegal conduct. . . ." *Id.* at 238. The union "was entitled to form" its organization. It was "entitled to solicit members and the employees were entitled to join. These rights cannot be brushed aside as immaterial for they are of the very essence of the rights which the Labor Relations Act was passed to protect and the Board could not ignore or override them in professing to effectuate the policies of the Act. To say that of the . . . [employees] who did join there were not those who joined voluntarily . . . would be to indulge an extravagant and unwarranted assumption." *Ibid.*

³¹ Nor will it do for the Board to say that we are invoking a rule of damages relevant to private injury but not germane to the public character of the rights created by the Act. The rule has its most frequent application in antitrust litigation, and one would be hard put to say whether the antitrust laws or the National Labor Relations Act have a more distinctively public character. See *Radorich v. National Football League*, 352 U.S. 445, 453-454 and n. 10; *Rogers v. Douglas Tobacco Board of Trade, Inc.*, 266 F. 2d 636, 644 (C.A. 5).

II. THE BOARD DISREGARDS THE BENEFITS RECEIVED FROM DUES AND FEES, THE COSTS INCURRED IN PROVIDING THE SERVICES, AND OTHER COGENT FACTORS.

The Board's indifference to the absence of "actual exaction" of union dues and fees is matched by its total obliviousness to the benefits received from the payments, the costs incurred in providing the services, and other cogent factors. In view of the Board's major premise that union membership is to be attributed to the employees' apprehension of union discrimination, it is perhaps not surprising that the Board should forget that there are genuine advantages to union membership. Consideration of what the Board forgets—and surely has not evaluated—further demonstrates the invalidity of its refund order.

Employees voluntarily pay union dues and fees because they know they cannot have the benefits of union representation without contributing to defrayal of the expense. The negotiation and administration of an agreement cost money. Effective representation requires a full-time paid staff, at the international level at least if not also at the local level. Preparing and presenting a case in arbitration is not inexpensive; and arbitrators must be paid.

Dues and fees go towards defraying the cost. They do not repose in depositories accumulating compound interest. They pay for services. It is safe to assume that a refund order requires the return of dues and fees much of which have already been expended. Hence, to require the refund of dues and fees does not simply mean that the employees will have received the benefits of union representation without contributing to defrayal of their cost. The moneys for reimbursement must come from somewhere, and insofar as the

unions are concerned, they must come from the dues and fees paid by other employees working on other jobs. What reimbursement comes down to; therefore, is that the employees who receive a refund will have the benefits they secured from union representation paid for by employees working elsewhere. We find it hard to believe that this serves to effectuate any policy of the Act.

Furthermore, the refund of dues and fees not only disregards the cost of past services, it impairs the capacity of the union to render future services. To drain a union's treasury is, to the extent of the drain, to disable it from functioning as effectively in negotiating and administering future agreements. Should a strike be necessary to consummate a satisfactory settlement, the wherewithal to pay strike benefits and defray other costs may have been destroyed or prejudicially curtailed. In addition, aside from the negotiation and administration of an agreement, unions undertake to provide for their members many valuable benefits which are intraunion in character. Death or disability plans, mutual insurance, medical care, institutions for the aged and the infirm, and vacation facilities are among these.³² To drain the union's treasury by requiring the refund of dues and fees may seriously jeopardize its ability to meet existing commitments and prudently to undertake additional benefit programs. This too does not serve to effectuate any policy of the Act.

This case is illustrative. The constitution of United Brotherhood provides for the payment of strike benefits (R. 112-113). So does that of the District

³² See Barbash, *The Practice of Unionism*, 300-304 (1956).

Council (G.C. Ex. 8, Strike Rule 7, p. 53). The constitution of United Brotherhood also establishes numerous intraunion benefits. A funeral donation is provided for in the event of the death of a member or his spouse (R. 105-107). A disability donation is payable in the event of accidental injury (R. 107-111). A home for aged members is maintained at Lakeland, Florida (R. 97, 111). In lieu of entering the home, pensions are payable (R. 111). For the four year period ending December 31, 1953, United Brotherhood paid \$669,944.65 in strike benefits, \$9,383,350.24 in death and disability donations, \$11,948,310 in pensions, and the cost of maintaining the home for the aged was \$1,300,177.17.³³

The Board not only ignores the benefits the member received in the past, but its refund order also places the member himself in an impossible predicament. The constitution constitutes a contract between the member and the union.³⁴ The member pays fees and dues in fulfillment of his part of the bargain. If the fees and dues he paid are returned to him, his membership in the union is necessarily severed (R. 102). If he wishes to rejoin, he is not only subject to the expense of a "readmission fee," but he "may be readmitted only as a new member . . ." (R. 102). And since eligibility for intraunion benefits, and the amount of the benefit, are based on the length of union mem-

³³ Proceedings of the Twenty-Seventh General Convention of the United Brotherhood of Carpenters and Joiners of America, November 15-19, 1954, pp. 169, 178, in evidence as General Counsel's Exhibit No. 21 in the record in *United Brotherhood of Carpenters and Joiners, et al.*, 125 NLRB No. 81.

³⁴ See *International Association of Machinists v. Gonzales*, 356 U.S. 617, 618.

bership (R. 106-111), readmission as a "new member" defers eligibility for intramunion benefits and may result in diminishing the amount of the benefit ultimately received. The Board has not yet addressed itself to the dilemma of the member who is the recipient of a refund but who prefers the advantages of continuing his membership in the union.

A final incongruity should be noted. Apparently, in this case, United Brotherhood, the District Council, and the Local Union are each individually responsible for refunding to the employees the full amount of the fees and dues paid by the employees for the period beginning six months preceding the filing of the unfair labor practice charge (R. 7, 8-9). Yet United Brotherhood and the District Council never received the full amount, and the Local Union never retained the full amount, each being entitled to but a designated share of the whole (*supra*, p. 5). To be mulcted of moneys which one has never even had is beyond the tolerance of any concept of remedial relief.

The Board's rationale is devoid of mention, much less consideration, of any of these factors. The Board has failed in its obligation "of taking fair account . . . of every socially desirable factor in the final judgment." *Phelps Dodge Corp. v. National Labor Relations Board*, 313 U.S. 177, 198. It enters a refund order with the discriminating discernment of "a shotgun blast. . . ." *National Labor Relations Board v. United States Steel Corp.*, 278 F. 2d 896, 901 (C.A. 3), certiorari pending, No. 228, October Term, 1960.

III. THE REFUND ORDER IS PUNITIVE IN PURPOSE.

The true thrust of the refund order is revealed in the Board's statement that "a mere cease and desist order will have little impact" and the "reimbursement remedy more properly effectuates the purposes of the Act because it provides not only a deterrent to future violations but an incentive to future compliance." *Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224. The real reason for the refund requirement is thus to coerce compliance. It is "nothing more than a fine which, in this instance, is paid into private, rather than public, coffers." *National Labor Relations Board v. United Steel Corp.*, 278 F. 2d 896, 900 (C.A. 3), certiorari pending, No. 228, October Term 1960.

In the posture typified by this case and No. 85, the refund order has come to be known as the *Brown-Olds* remedy, the name being derived from the case decided on February 28, 1956, in which the current version of the refund order was devised. *Brown-Olds Plumbing and Heating Corp.*, 115 NLRB 594. In its present form the refund order drastically departs from the limitations which cabined its use in the past. As the General Counsel of the Board³⁵ has explained, what the Board has done "was to extend the broad reimbursement order, theretofore reserved for Section 8(a) (2) situations, to payments coerced under illegal union security or hiring arrangements with any unions even if not employer-dominated or supported." Address, June 27, 1958, 42 LRRM 101, 102.

³⁵ All references in this brief to the General Counsel are to Jerome D. Fenton and to statements made by him during his term of office from March 4, 1957 to June 26, 1959.

The attribute of the order which lends it to punitive application is the staggering financial liability it entails. This can be quickly illustrated. Assume a local union with a membership of two thousand all covered by one agreement. Assume further a monthly dues rate of four dollars, giving the local a monthly income from dues of eight thousand dollars. A contested proceeding before the Board, from the filing of the charge through the enforcement of the order, by a Court of Appeals, usually takes about three years. Since the liability to refund the dues begins to run from the date six months preceding the filing of the charge, an enforced refund order against a local union of two thousand members paying four dollars per month would require the payment of \$280,000. Nor does this take into account initiation fees received during the period. And the liability is fantastically multiplied if the union is a party to a multi-employer contract. As the Board has said (*Local 138, International Union of Operating Engineers*, 123 NLRB 1393, 1409-10):

In cases involving multi-employer contracts in which the contracting union and one or more employers are named respondent parties to the contract, the union's liability for reimbursement of sums unlawfully exacted also shall extend to all employees covered under such contract found unlawful; each named employer respondent shall be liable jointly and severally with the union for the reimbursement of sums paid by its own employees. Although a collective-bargaining contract may extend to employees of more than one employer, the limitation upon the liability of a particular employer derives from the fact that an employer participates in a contract only to the extent its own employees are involved. On the other hand, a union which maintains contractual relations with one or more employers participates to

the full extent of the contract's coverage. Accordingly, it would seem reasonable and logical that a union's liability for reimbursement extend to all employees of all employers unlawfully coerced by the union's contract into paying monies to the union.

It is therefore apparent that a union and an employer can resist yielding to the Board's conception of a valid union security or hiring agreement only at the risk of staggering financial loss should the Board prevail. This is the lever which the Board has deliberately exploited to coerce compliance. Thus, on February 7, 1958, the General Counsel of the Board wrote to the Building and Construction Trades Department, AFL-CIO, Associated General Contractors, and National Contractors Association, advising them "to correct" their hiring arrangements within three months under pain of application of the *Brown-Olds* refund order if they did not (5 CCH Lab. Law Rep. * 50,060 (old edition)):

As you know, the Board, commencing with the *Brown-Olds* case, 115 NLRB 594, has held that where illegal hiring arrangements exist, either pursuant to a contract or practice, the appropriate remedy, in addition to the usual remedial provisions, requires the reimbursement of all monies, including initiation fees, dues, permit fees, assessments, "dobies," and the like, collected pursuant to such arrangements. The purpose of the Board in applying the so-called *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by, among other things, prevailing upon employers and unions to correct their illegal hiring arrangements.

It would be preferable, of course, if the parties took it upon themselves to correct their illegal hir-

ing arrangements, thereby achieving the same basic purpose sought by the Board but without the necessity of Board action. Such overall elimination of illegal hiring arrangements, by voluntary action, would not only help effectuate the purposes of the Act, but would clearly be an important step in the general public interest and in the furtherance of the fundamental rights of employees.

With this thought in mind, I would like to suggest that during a period of three months, commencing March 1, 1958, employers and unions, who are party to illegal hiring arrangements, vigorously undertake to correct such arrangements by bringing them into compliance with the provisions of the Labor Management Relations Act of 1947. If this is done, it may warrant the disposition, without full application of the *Brown-Olds* reimbursement remedy, of charges based upon illegal hiring arrangements which have been voluntarily conformed to the provisions of the Act during the period prior to June 1, 1958. It will also warrant my recommending to the Board during such period a similar disposition of all cases currently pending or brought before the Board with respect to such illegal hiring arrangements. It is understood, however, that apart from the non-application of the *Brown-Olds* reimbursement remedy, all charges and cases relating to or arising out of illegal hiring arrangements must be processed in normal fashion although such arrangements may have been corrected during the period prior to June 1, 1958.

The Office of the General Counsel will be pleased to cooperate with employers and unions in this matter.

Thereafter, on April 1, 1958, the Board issued its decision in *Mountain Pacific Chapter of the Associated General Contractors*, 119 NLRB 883, remanded, 270

F. 2d 425 (C.A. 9), in which it formulated the three requirements for inclusion in agreements establishing hiring halls (*supra*, p. 23 and n. 29). Significantly, the order in *Mountain Pacific* did not require the refund of dues and fees. Nevertheless, on April 23, 1958, three weeks after *Mountain Pacific* had issued, the General Counsel wrote another letter, this time to the Associated General Contractors, National Contractors Association, and National Electric Contractors Association, extending the moratorium for application of the *Brown-Olds* remedy from June 1, 1958 to September 1, 1958, and advising to the establishment in *Mountain Pacific* of "certain legal requirements for exclusive hiring arrangements" (5 CCH Lab. Law Rep. 50,074 (old edition)):

On February 7, 1958, this Agency announced that during the period March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act, 1947.

Since then we have been advised that a number of unions and employers are vigorously undertaking to bring their union-security and hiring arrangements into conformity with the Act. We have been further advised that unions and employers are also reviewing such arrangements in light of the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.* (119 NLRB No. 126-A, released April 1, 1958), which established certain legal requirements for exclusive hiring arrangements.

In view of these circumstances, a further extension of time beyond June 1, 1958, is warranted so

that the parties may have sufficient opportunity to complete their negotiations in an orderly and informed manner. We have therefore extended to September 1, 1958, the period during which this Agency will withhold full application of the *Brown-Olds* reimbursement remedy where the parties voluntarily and diligently correct their union-security and hiring arrangements.

Thereafter, on August 19, 1958, the General Counsel wrote to the Building Trades Employers and Unions advising that, while there would be no general extension of the moratorium beyond September 1, 1958, the *Brown-Olds* remedy might be withheld if compliance were achieved by November 1, 1958, by those employers and unions currently engaged in "genuine efforts" in that direction (5 CCH Lab. Law, Rep. 150,103 (old edition)):

On February 7, 1958, this Agency announced that during the period from March 1 to June 1, 1958, it would withhold full application of the *Brown-Olds* reimbursement remedy where employers and unions voluntarily bring their union-security and hiring arrangements into conformity with the provisions of the Labor Management Relations Act of 1947, as amended. On April 23, 1958, the period during which this announced policy would apply was extended to September 1, 1958. This extension was based, in part, on the vigorous undertaking by a large number of unions and employers to comply with the above policy and on the desire to provide the parties with a sufficient opportunity to review their agreements in light of the Board's decision in *Mountain Pacific Chapter of the Associated General Contractors, Inc.*, (119 NLRB No. 126-A, released April 1, 1958, which established certain legal requirements for exclusive hiring arrangements).

and to complete their negotiations in an orderly and informed manner.

In supplementation of the foregoing and, in accord with our announced desire to cooperate with and to assist the parties in whatever way possible in this matter, the Office of the General Counsel recently issued a statement with regard to union hiring halls and referral systems in which comment was made on various questions which had been raised by unions, employers and other interested parties as to the scope and implications of the Board's *Mountain Pacific* decision.

Since the issuance of that statement we have received numerous communications which demonstrate that many employers and unions are still in the process of renegotiating their agreements in an attempt voluntarily to conform such agreements with the Act but, that due to unavoidable delays inherent in such negotiations, and the complex problems involved, appropriate new agreements, in many instances, will not be executed by September 1.

Under all the circumstances, we have determined that no general extension of the policy of withholding the full application of the *Brown-Olds* remedy beyond September 1 is warranted. However, where the parties have initiated steps and have made genuine efforts to correct their union security and hiring arrangements prior to the September 1 deadline, the full application of the remedy may be withheld provided that conformity with the Act is achieved by November 1, 1958.

You may be assured of our continued cooperation with your efforts to conform your union security and hiring arrangements to the requirements of the Act.

Then, on October 31, 1958, one day before the expiration of the November 1 deadline, the Board entered its

refund order in *Los Angeles-Seattle Motor Express, Inc.*, 121 NLRB 1629. It is this order which is before this Court in No. 85. It is No. 85 which is the case in which the Board for the first time based a refund order upon the invalidation of a hiring hall agreement because of the omission of the three requirements from it.

The Board thus gave point to its General Counsel's threat that, if compliance were not effectuated during the moratorium, the penalty would be imposition of the *Brown-Olds* remedy. As the General Counsel stated in an address at the 1959 Southeast Trade Exposition on March 21, 1959, "It was not until the eve of the November 1 deadline that the Board, in the *Los Angeles Seattle Motors* case, linked *Mountain Pacific* to the *Brown-Olds* rationale" (mimeo. copy, p 6). He stated in the same address that "The subsequent history of the *Mountain Pacific* decision has been, in large part, a concerted program by this Agency to encourage appropriate affirmative action by the contracting parties to conform their collective agreements and hiring practices to the requirements of *Mountain Pacific*. In this respect, the major spur has been the so-called *Brown-Olds* remedy . . ." (*id.* at p. 5). The spur was identified as "imposing a liability which may involve substantial sums of money" (*id.* at p. 7); he stated that "deterrence is the underlying consideration" (*id.* at p. 8); he described the moratorium as the period of "reprieve" (*id.* at p. 6).

This theme has been emphasized by the General Counsel in repeated speeches. In an address to the Building Industry Employees of New York State on June 27, 1958, he stated: "The purpose of the Board in fashioning the *Brown-Olds* reimbursement remedy is to effectuate the policies of the Act by prevailing

upon employers and unions to correct their illegal union-security arrangements" (42 LRRM 101, 103). In an address to the Illinois State Bar Association on November 7, 1958, he referred to the *Brown-Olds* remedy as "the first time employers and unions were to be held liable in a monetary sense for illegal union security or hiring arrangements. This liability potentially involves substantial sums of money . . ." (mimeo. copy, p. 4).

But the frankest avowal of the coercive and punitive character of the *Brown-Olds* remedy was given by the General Counsel in an address to the Rutgers University Conference on September 30, 1958. He stated that the "use that has been made of this extraordinary remedy . . . demonstrates vividly the capabilities of administrative pressure and persuasion . . ." (mimeo. copy, p. 6). He observed that "if employers and unions are to avoid serious consequences, these illegal arrangements must be eliminated. Liability potentially involves substantial sums of money . . ." (*id.* at p. 7). He stated that, as the parties became aware of the "serious monetary risk" they ran, they undertook to conform their agreements to the Board's requirement, and during this time "over the heads of the parties hung this statutory sword of Damocles—the constant awareness that *Brown-Olds* would be applied in full" (*ibid.*). He concluded that, in withholding the refund remedy during the period of the moratorium and threatening to impose it thereafter, "we paid heed to the homely adage of one of our very own citizens, who practiced what he preached at the turn of this twentieth century. I refer to President 'Teddy' Roosevelt. He carried a 'big stick' and with it he went far. We spoke softly and carried a 'big sword,' and the results to date have been heartening" (*id.* at p. 8).

These sentiments were echoed by Board Member John H. Fanning who, in referring to the current application of the refund order, stated that the Board "put teeth into the law . . ."³⁶ He later referred to it as the "stinger."³⁷ Board Member Joseph A. Jenkins reported that the Board "decided that the law must be observed and a remedy provided which would cause compliance therewith. * * * [It] thereafter applied to unions and companies the *Brown-Olds* reimbursement remedy, in order to interest companies and unions in the problem of observing the law."³⁸ And he later repeated that:³⁹

. . . in order that the construction industry and the unions affected thereby would pay some attention to what the Labor Board was saying we devised what is known as the *Brown-Olds* remedy.

The theory behind the *Brown-Olds* remedy is that we'll indicate to people that in the event they do not comply with the laws enunciated by Congress, we will require the refund of dues and assessments illegally exacted.

It is patent that the Board has put the refund order to a use which is at war with settled limitations upon its exercise of remedial power. *National Labor Relations Board v. District 50, United Mine Workers*, 355

³⁶ Address to the American Society for Personnel Administration at Jacksonville, Florida, February 6, 1959, p. 8.

³⁷ Address, Union Shops and Hiring Hall, The Third Yale Law School Alumni Day, April 25, 1959, p. 15.

³⁸ Address to the Contracting Plasterers and Lathers International Association, Washington, D. C., June 3, 1959, 44 LRRM 71, 72.

³⁹ Address to the Building Industry Employers of New York State, Lake Placid, New York, June 27, 1959, p. 9.

U.S. 453, 458, 463. It is patent that the Board is exercising punitive power, although its "power to command affirmative action is remedial, not punitive." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 236. It is patent that the Board is imposing a penalty to coerce compliance, but the "Act does not prescribe penalties or fines." *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 10. And when the Board states, as it does, that the refund remedy is appropriate "because it provides not only a deterrent to future violations but an incentive to future compliance" (*Local 425, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224), it suffices to say, with this Court, that "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 12. "Imposition of fines or jail sentences upon employers or unions would also be a deterrent, so far as such sanctions can act as a deterrent. But a fine is clearly the imposition of a penalty and the Labor Board is not authorized to impose penalties." *National Labor Relations Board v. United States Steel Corp.*, 278 F. 2d 896, 900 (C.A. 3), certiorari pending, No. 228, October Term 1960.

IV. RELIANCE UPON VIRGINIA ELECTRIC AND POWER CO. v. NATIONAL LABOR RELATIONS BOARD TO SUPPORT THE CURRENT VERSION OF THE REFUND ORDER IS MISPLACED.

The Board¹⁰ and the court below (R. 118-119) rely upon this Court's decision in *Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533, to support the use to which the current version¹ of the refund order is put. The reliance is misplaced. All this Court decided was that a refund order was within the Board's power and that exercise of the power was within the Board's discretion in the particular circumstances of that case. But the circumstances of *Virginia Electric* are so different from those in this case as to furnish no fair support for the result reached here. Thus the ruling circumstance in *Virginia Electric*, which controlled the evaluation of every other factor, was "that the Company was responsible for the creation of the I.O.F. [the contracting union] by providing its initial impetus and direction and by contributing support during its critical formative period." 319 U.S. at 540. The company-dominated character of the contracting union is at the heart of *Virginia Electric*.¹¹ Even as to company-dominated unions the Court declined to lay down a blanket rule. Referring to eleven preceding decisions of five Courts of Appeals, which had declined to approve refund orders, the Court stated "We need not now examine the various situations that were before the Circuit Courts of Appeals in the cases collected in Note 1, *ante*, or con-

¹⁰ *Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594, 600; *Local 125, United Association*, 125 NLRB No. 107, 45 LRRM 1223, 1224 and n. 6.

¹¹ See *National Labor Relations Board v. McGough Bakeries Corp.*, 153 F. 2d 420, 425 (C.A. 5); cf. *National Labor Relations Board v. Clinchfield Coal Corp.*, 145 F. 2d 66, 73 (C.A. 4).

sider hypothetical possibilities. We decide only the case before us and sustain the power of the Board to order reimbursement in full under the circumstances here disclosed." 319 U.S. at 545.⁴² "It is thus worthy of note that in the *Virginia Electric* case the Court did not undertake to disapprove any of the eleven decisions of the five circuits cited in its first footnote,—all of which disapproved Board orders requiring reimbursement of check-off dues." *Morrison-Knudsen Co. v. National Labor Relations Board*, 276 F. 2d 63, 76 (C.A. 9).

Plainly the Court has laid down no blanket rule authorizing a refund under any circumstances or for a punitive purpose. The controlling factor of domination present in *Virginia Electric* is absent here. It cannot be said here, as it was in *Virginia Electric*, that the union is the employer's "creature" (319 U.S. at 540), that the employer imposed upon the employees "the cost of maintaining an organization which he has dominated" (*id.* at 541), that the union had "an employer-dominated beginning" and the employer "seized upon" the closed-shop and check-off "to establish the . . . [union] firmly" (*id.* at 542), that the union is "a type of organization which Congress has characterized as detrimental to the interests of employees and provocative of industrial unrest" (*id.* at 544),⁴³ and that the

⁴² Of the preceding cases, the most cogently reasoned are *Western Union Tel. Co. v. National Labor Relations Board*, 113 F. 2d 992, 997-998 (C.A. 2), and *National Labor Relations Board v. J. Greenbaum Tanning Co.*, 110 F. 2d 984, 988-989 (C.A. 7).

⁴³ The United Brotherhood of Carpenters is composed of 3,000 local unions with a membership of 835,000. *Directory of National and International Labor Unions in the United States, 1959*, Bull. No. 1267, U.S. Dept. of Lab., Bur. Lab. Stat. 33 (1959).

moneys went "into the treasury of the Company's creature to accomplish purposes the Company evidently believed to be to its advantage" (*ibid.*).

In a word, in the case of company domination, "the union is an illegitimate union from the beginning. Its existence is illegal. The dues themselves are the fruits of the unfair labor practice for, in the absence of the unlawful practice, there would have been no union; a fortiori, there would have been no dues paid to it. Reimbursement is simply a way of pulling the unlawful organization up by the roots. An analogous situation is the annulment of a marriage." *National Labor Relations Board v. United States Steel Corp.*, 278 F. 2d 896, 899 (C.A. 3), certiorari pending, No. 228, October Term 1960.⁴¹

⁴¹ As we have said, even in the case of company domination the propriety of a refund order is not automatic, and its enforcement has been denied subsequent to *Virginia Electric*. *National Labor Relations Board v. Shedd-Brown Mfg. Co.*, 213 F. 2d 163, 170-171 (C.A. 7).

Another situation should be distinguished. The rationale of *Virginia Electric* has been extended to justify a refund order in cases of active and widespread assistance of a union by an employer which, although short of domination, is deemed sufficiently serious to impair effectively the union's independence, especially when considered in conjunction with an invalid union security clause obligating the employees to pay union dues and fees as a condition of employment. This extension, apparently at first sparing and circumspect, seems recently to have dilated swiftly, perhaps under the momentum of the Board's use, as in this case, of the refund order where neither domination nor assistance is shown. Sometimes courts of appeals have set aside refund orders in assistance situations. *National Labor Relations Board v. Adhesive Products Corp.*, 258 F. 2d 403, 408-409 (C.A. 2); *National Labor Relations Board v. Halton Chemical Co., Inc.*, 279 F. 2d 189 (C.A. 2); *National Labor Relations Board v. McGough Bakeries Corp.*, 153 F. 2d 420, 425 (C.A. 5); *National Labor Relations Board v. Braswell Motor Freight Lines*, 213 F. 2d 208 (C.A.

Virginia Electric and this case are thus poles apart. Requiring the refund of fees and dues paid to a company-dominated union in conjunction with its dissolution has nothing in common with ordering a refund of fees and dues paid to a union whose authority to exist and function and to represent employees is altogether unquestioned.

5). Sometimes courts of appeals have enforced such orders. *National Labor Relations Board v. Local 291, International Brotherhood of Teamsters*, 279 F.2d 83, 86-88 (C.A. 2); *National Labor Relations Board v. Revere Metal Art Co., Inc.*, 46 LRRM 2121, 2123-24 (C.A. 2, May 6, 1960); *Paul M. O'Neill International Detective Agency, Inc. v. National Labor Relations Board*, 46 LRRM 2503, 2511-12 (C.A. 3, June 22, 1960); *Dirie Bedding Co. v. National Labor Relations Board*, 268 F.2d 901, 907 (C.A. 5); *National Labor Relations Board v. Broderick Wood Products Co.*, 261 F.2d 548, 558-559 (C.A. 10); *National Labor Relations Board v. General Drivers Local No. 886*, 264 F.2d 21 (C.A. 10); *National Labor Relations Board v. Parker Brothers*, 209 F.2d 278 (C.A. 5); cf., *National Labor Relations Board v. Spicwak*, 179 F.2d 695, 702 (C.A. 3), in which "the point was not argued by counsel" (*National Labor Relations Board v. United States Steel Corp.*, 278 F.2d 896, 902 (C.A. 3), *certiorari pending*, No. 228, October Term 1960). The apogee seems to have been reached in basing a refund order exclusively upon the union security provision of the agreement, found to be invalid solely because of the contracting union's lack of majority when the original agreement was entered into, and having the refund run in favor of all employees covered at any time by the original and any successor agreement. *Local Lodge No. 1124 v. National Labor Relations Board*, 264 F.2d 575, 582 (C.A.D.C.), reversed on other grounds, 362 U.S. 411. Whether or not the Board will order a refund in an assistance situation, and whether a court of appeals will enforce or set aside such an order, does not appear to rest upon much more than impressionism.

Domination and assistance aside, refund orders have been entered in favor of specific employees found in their particularized situations to have been individually coerced into paying dues and fees. E.g., *National Labor Relations Board v. Local 401*, 205 F.2d 92, 101, 102, n. 1 (C.A. 1), enforcing 100 NLRB 801, 809, 811, 812; *National Labor Relations Board v. Local 120, United Association*, 239 F.2d 327 (C.A. 3).

CONCLUSION

For the reasons stated the judgment should be reversed and the case remanded to the Court of Appeals with directions to set aside that part of the Board's order which requires the refund of "dues, non-membership dues, assessments, and work permit fees."

Respectfully submitted,

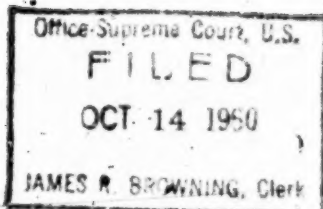
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September 1960.

FILE COPY



No. 68

In the Supreme Court of the United States

OCTOBER TERM, 1960

LOCAL 60, UNITED BROTHERHOOD OF CARPENTERS, ET AL.,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the Court of Appeals (R. 114-119) is reported at 273 F. 2d 699. The findings of fact, conclusions of law, and order of the Board (R. 1-13) are reported at 122 NLRB 396.

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1960 (R. 120). Certiorari was granted June 27, 1960, 363 U.S. 837 (R. 122). The jurisdiction of this Court rests on 28 U.S.C. 1254(1) and Section 10(e) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*) provides that:¹

* * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

QUESTION PRESENTED

Whether the National Labor Relations Board, having found that the employer and the union are maintaining a hiring arrangement which unlawfully encourages union membership, may properly require, not only that the parties cease giving effect to the illegal arrangement, but that they refund to the employees dues and other fees paid to the union under that arrangement in order to acquire or retain employment.²

¹ Other relevant statutory provisions are set forth in the Appendix, pp. 38-40, *infra*.

² The same issue is presented in No. 85, this Term. However, there the hiring arrangement was illegal because of a failure to contain the Board's *Mountain Pacific* safeguards (the validity of which are involved in No. 64, this Term), whereas here it is illegal because union membership was required as a condition of employment.

STATEMENT

A. THE BOARD'S FINDINGS

Mechanical Handling Systems, Inc. manufactures, designs and installs conveyors and allied equipment (R. 15). On May 10, 1956, it entered into a written contract with petitioner United Brotherhood of Carpenters, whereby it agreed to "recognize the jurisdiction claims of the [Brotherhood] * * * abide by the rules and regulations established or agreed upon by the [Brotherhood] of the locality in which any work of our company is being done, and employ members of the [Brotherhood]" (R. 16, 30). The constitution and trade rules of petitioner District Council, thus incorporated in the contract, provide that union members may not work with a member or ex-member who has been suspended or fined until the fine is paid, and that union members may not work with non-members without permission of the Council (R. 5; 92, 96). They also require that members present working cards to the union steward on the job before going to work, and that members of other locals coming into the area must obtain working cards before seeking employment (R. 5; 90-91, 94-95). The Council, which derives its finances in part from the sale of clearance cards and permits, is given sole right to issue quarterly working cards to locals for members "together with such extra cards as may possibly be required in addition thereto," the local union being held

³ Petitioner Council has jurisdiction over the Indianapolis, Indiana area. It is composed of delegates from various locals in that area which are affiliated with the Brotherhood, including petitioner Local 60 (R. 18; 89).

strictly accountable therefor (R. 5; 90, 94). The Council is also vested with full control over working cards with authority to revoke, and a clearance card committee is required to examine and pass upon the acceptability of all clearance cards (*ibid.*). Finally, the Council rules require that on all jobs where three or more journeymen carpenters are employed there shall be a foreman of carpenters who must be a member in good standing, and who shall share responsibility with the union steward for enforcement of all trade rules (R. 5; 91-92, 95).

The dues payable to the Local, as a condition of maintaining membership in good standing, is \$3.50 per month, and the initiation fee is \$125 (R. 95, 100-101; G.C. Exh. 8, Art. VII, Sec. 1, p. 21). Lesser fees and dues are payable by apprentices (*ibid.*). The cost of a "Working Permit," payable by a member working in another jurisdiction is "not less than Seventy-five Cents (75¢) per month, nor more than the monthly dues of the Local Union or District Council," and, if a member less than two years, he shall also "pay any difference in initiation fee * * *" (R. 103-104).

In January 1957, the Company began work on a contract for installation of conveyor equipment in the Ford Motor Company plant in Indianapolis (R. 17; 36). About January 7, Ralph Smith, the Council's president and business agent, and the only person authorized to make contracts on behalf of the Council and Local 60, called upon the Company's superintendent in charge of the Ford Motor Company job,

Sherman Roberts (R. 17; 36-37, 60, 63). Roberts told Smith that the Company intended to abide by the terms of the master contract with the Brotherhood in performance of the installation work at the Ford plant (R. 18-19; 60). Roberts agreed on behalf of the Company to hire all needed millwrights and carpenters through Local 60, and to employ only applicants who brought referral slips from the Local (R. 19; 38, 40-41). Roberts further agreed that wages and working conditions on the Ford job should be governed by the terms of the Council's current contract with the local Building Contractors Association (R. 19; 59, 60, 63-64, 88).

Roberts next asked Local 60 to refer millwrights to the job for immediate work and the Local sent out four or five the following day (R. 17; 38). Thereafter, the Company hired through Local 60 and the Council and, as agreed, took on no carpenter or millwright who did not bring a referral slip from the Local (R. 17-18; 40-44). Both the Council and the Local, in turn, referred and cleared applicants for work on the Ford job (R. 24; 47, 50-51, 52). It does not appear that any non-members were cleared for employment on the project.

Hafford B. Carter had worked for the Company on a project in Louisville, Kentucky, for two and one-half years when his foreman suggested that he apply at the Indianapolis job (R. 20; 66-67). Elza Stevenson had also worked on the Louisville job at various times (R. 76). Neither man was a member of Local 60, although both held membership in other locals affiliated with the Brotherhood (R. 66, 76).

Late in January 1957, the two applied to Roberts who told them that he would like to employ them when operations began at the Ford plant and suggested that they attempt to get referral cards from the Local (R. 20; 39-40, 53-57, 66-68, 77-78). Roberts added that they probably would have "an awful lot of trouble" in getting the Local to clear them for work on the project (R. 20; 68). Carter and Stevenson then called at the Council's office. There a person in charge telephoned Roberts, who said that he would have work for them the following week (R. 20; 69-70, 78-79). The men were refused referrals at this time and returned to Louisville (R. 20; 70, 79).

On February 5, Carter telephoned Roberts and learned that he now had plenty of work and wanted both Carter and Stevenson to start on the job the next day (R. 20-21; 70). When Carter and Stevenson reported at the project on the following day, Roberts again voiced a fear that the men would have trouble "trying to get through the union" but thought that he would "give it a try" (R. 21; 71-72, 79-80). He then wrote Smith, requesting working permits for both men and describing them as "good conveyor men" who had worked for the Company before (R. 21; 72, 80-81).

Carter and Stevenson presented this letter to Local 60's financial secretary, who referred them to the office of the Council (R. 72, 81). The two applicants then called on Smith at the Council's office and asked him for referrals. Smith, however, said that he must first check with Roberts and told the men to come back the next day. When they returned the following

day, however, Smith refused to give them referrals to the job, and they never obtained employment there (R. 21-22; 62-63, 73-74, 74-75, 81-84.)

B. THE BOARD'S CONCLUSIONS AND ORDER

Upon these facts, the Board concluded that the master contract between the Company and the Brotherhood, together with the oral agreement between the Company, Local 60 and the Council covering the hiring of employees, had the effect of making employment at the Company's project at the Ford plant conditional upon membership in Local 60, and thus constituted "a single comprehensive scheme for complete evasion of the statutory ban on closed shops" (R. 5-6).⁴ The Board therefore held that the unions,⁵ by maintaining this contractual arrangement, were causing discrimination in violation of Section 8(b)(2) and (1)(A) of the Act, and that the application thereof to prevent the employment of applicants Carter and Stevenson similarly violated these statutory provisions (R. 6).⁶

The Board's order (R. 8-10) required the Brotherhood, the Council and Local 60 to cease and desist

⁴ The Trial Examiner had found that the oral hiring agreement between the Company, Local 60 and the Council unlawfully conditioned employment on union membership, but dismissed the complaint as to the Brotherhood, concluding that there was no connection between the two contracts (R. 23).

⁵ No charge was filed against the Company (Tr. 176).

⁶ The Brotherhood, the Council and Local 60 were collectively found to bear responsibility for all the unfair labor practices found except that, since Stevenson did not file a charge against the Brotherhood, no finding was made against the Brotherhood respecting the discrimination against Stevenson (R. 6).

from making, maintaining or enforcing any agreement which illegally conditioned employment upon union membership, and from in any like or related manner interfering with the employees' Section 7 rights. Moreover, the unions were required to make Carter and Stevenson whole for any loss of earnings they may have suffered as a result of the discrimination against them, and to notify them that henceforth they would not unlawfully be denied work referrals.

In addition, the Board found that (R. 7):

* * * dues, non-membership dues, assessments, and work permit fees, were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, [and that it] would [not] effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees.

Accordingly, the Board further ordered the three unions (*ibid.*) "jointly or severally, to refund to the employees involved the dues, non-membership dues, assessments, and work permit fees, paid by the employees as a price for their employment."

C. THE DECISION OF THE COURT OF APPEALS

The Court of Appeals sustained the Board's unfair labor practice findings and enforced its order in full (R. 114-119). Respecting the reimbursement provisions of the order, the court stated (R. 118-119):

In accordance with Section 10(b) of the Act, the Board limited this provision of the order to monies collected within the period beginning six months preceding the date of service of the original charge against each union (R. 7, n. 5).

9

Respondents argue that the evidence fails to show any dues, assessments and fees exacted under the agreements found to be unlawful; that on the contrary, all such fees were paid voluntarily. However, in our opinion, the record does support the Board's finding that such fees were coerced in that there was present an implicit threat of loss of jobs if those fees were not paid. The rules of the Council and Local 60 provided for supervision on the job to prevent any but local union members in good standing from working. The three respondents had full control of employment of millwrights and carpenters on the Ford job, even to veto * * * the Company superintendent's wishes to hire two former employees, both members of other locals affiliated with the same International. * * * Respondents argue that the affected employees were already union members when the agreements were made and hence could not have been forced to join by the agreements. They were, however, deprived of their right to resign. The burden rested on respondents to show that even without the unlawful discrimination, the Company's employees would have maintained their membership in Local 60. * * *

Accordingly, the court concluded that reimbursement of fees was "a proper and appropriate remedy to restore employees to the position they would have enjoyed but for the illegal practices" (R. 119).

SUMMARY OF ARGUMENT

The issue here is whether the Board, as a means of eradicating the effects of a hiring arrangement which

unlawfully encourages union membership, may properly require, not only that the employer and the union cease such activity in the future, but that they reimburse the employees for dues and fees paid to the union under that arrangement while it was in effect. It is the Board's position, accepted by the court below, that such a reimbursement remedy is within the Board's powers under Section 10(c) of the Act, and that thus the reimbursement part of its order here and in No. 85 is entitled to stand.

A. As this Court stated in *Virginia Electric and Power Company v. National Labor Relations Board*, 319 U.S. 533, 540, in sustaining the Board's power to order reimbursement of dues and fees paid to a labor organization, such order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." No such showing can be made here.

In 1956, finding that, despite the ban which the Taft-Hartley amendments had imposed nine years earlier, closed-shop practices were still rampant, the Board concluded that a remedy more effective than a cease and desist order was required if such practices were to be curtailed and the statutory policy which they impaired vindicated. Accordingly, in the *Brown-Olds* case, 115 NLRB 594, the Board announced that, where, as here, the parties had entered into an arrangement which required an employee to be a union member in order to secure and retain employment, the policies of the Act would best be served by requiring a reimbursement of the dues and fees

paid to the union under that arrangement. And, thereafter, in *Los Angeles-Seattle Motor Express*, 121 NLRB 1629 (the case involved in Nos. 64 and 85), the same remedy was extended to hiring arrangements which, though not operated as a closed shop, had the same effect on employees because they failed to contain adequate safeguards that the union's exclusive control over hiring would be exercised without regard to union membership considerations.

It is apparent that employees and unions would be more reluctant to enter into or continue illegal hiring arrangements if they know that they will be required to refund monies collected thereunder, than they would be if the risk were merely a cease and desist order. From this standpoint, the reimbursement remedy for hiring arrangements which give the union an unlawful control over initial employment thus effectuates the statutory policy of protecting "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Act, Section 1). Moreover, such a reimbursement remedy is reasonably related to the right which it purports to vindicate.

Thus, where, as here, employees are required to be union members to obtain jobs, or where, as in No. 85, they are led to believe that this is necessary, they are encouraged to become union members, or, if they are members, to retain that membership in good standing. The way in which union membership is acquired or maintained is by paying initiation fees and periodic dues to the union. A refund of the dues and fees collected under the illegal arrangement hence merely

"returns to the employees what has been taken from them" under the illegal practice and thereby restores "to the employees that truly unfettered freedom of choice which the Act demands." *Virginia Electric and Power Company v. National Labor Relations Board*, 319 U.S. 533, 541.

B. The argument that a reimbursement remedy for hiring practices which illegally encourage union membership is improper rests primarily on the premise that the Board may order dues and fees to be refunded only if they were exacted under coercion, and such coercion may not be shown to exist where, as here and in No. 85, the employees were union members before they were subjected to the illegal hiring arrangement in question. This overlooks the fact that, even if the employee were already a union member, the arrangement can still have a coercive impact on him. For, by requiring the employee to retain his union membership as a condition of employment, or leading him to believe that this is necessary, the illegal arrangement deprives him of his right to refrain from union activity without imperiling his job opportunities.

In any event, as we read the opinion for the Court in *Virginia Electric*, 319 U.S. 533, the validity of a reimbursement order is not contingent upon a showing that the employees paid the money to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies. For, even if many of the employees would have paid dues and fees to the union

anyhow, this does not privilege the use of an illegal procedure to collect that money, nor bar a remedy which will fully and effectively neutralize the impact of such unlawful action. Nor is *Virginia Electric* distinguishable on the ground that the union there was company-dominated. The dominated character of the union was simply the unfair labor practice which brought the Board's remedial power into play there; the power is no less when, as here, it is brought into play by hiring practices which unlawfully encourage union membership.

C. The Board's reimbursement remedy is proper though it fails to deduct the benefits which the employees may have obtained from the union as a result of the dues and fees paid. Even if the benefits "purchased" with the fees and dues paid to the union could be accurately ascertained, the Board would still be warranted in not taking them into account. The monies collected under the illegal hiring arrangement went for a group of benefits, which were not severable. Along with the job, the employee may have obtained insurance and other benefits, but he could not pick what he would receive for the dues and fees paid; he bought either the whole package or none of it. Since the hiring arrangement was an illegal means of exacting the fees and dues, it could not have been used to purchase any part of the package, no matter how advantageous.

Nor can petitioners be relieved of the responsibility for refunding dues and fees which were unlawfully collected by pleading hardship. Should hardship develop in making the payments, this is a matter which

can be worked out at the compliance stage of the proceeding.

ARGUMENT

THE BOARD MAY PROPERLY REQUIRE THAT EMPLOYEES BE REIMBURSED FOR DUES AND FEES PAID TO THE UNION UNDER AN ILLEGAL HIRING ARRANGEMENT

INTRODUCTION

The facts summarized in the Statement show, and petitioners do not contest, that they had an agreement with Mechanical Handling Systems which required employees to be members of Local 60 in order to obtain employment on the Ford job, and that, pursuant to this agreement, employment was denied to two employees who were members of a local other than Local 60.^{*} There is no question that a closed-shop arrangement of this type encourages union membership in violation of Section 8(a)(3) of the Act, and restrains employees in the exercise of their rights, guaranteed by Section 7, to join or assist labor organizations, or to refrain from such activity.⁹ The issue here is

^{*} Petitioners' suggestion (Br. 4) that the employees were denied employment because priority was accorded to other men who were waiting for work longer is contrary to the findings made by the Board and affirmed by the court below. On these findings, which are not open to contest here, the two employees were denied referral because they were not members of, or in good standing with, Local 60. In other words, the basis for referral was not the length of time an employee was out-of-work in the area but rather membership in Local 60.

⁹ See *National Labor Relations Board v. Eichleay Corp.*, 206 F. 2d 799, 802-803 (C.A. 3); *National Labor Relations Board v. McGraw & Co.*, 206 F. 2d 635, 638-639 (C.A. 6); *Red Star Express Lines v. National Labor Relations Board*, 196 F. 2d 78, 81 (C.A. 2); *National Labor Relations Board v. Shuck Construction Co.*, 243 F. 2d 519, 520-521 (C.A. 9).

whether the Board, as a means of eradicating the effects of the illegal hiring arrangement, may properly require, not only that the employer and the union cease such activity in the future, but that they reimburse the employees for dues and fees paid to the union under that arrangement while it has been in effect.¹⁰ The same issue is presented in *National Labor Relations Board v. Local 357, International Brotherhood of Teamsters*, No. 85, this Term, where the Board imposed the same remedy for a hiring arrangement which, though not operated as a closed shop, likewise illegally encouraged union membership, by giving the union exclusive control over hiring and not providing adequate safeguards to insure that this power would be exercised without regard to the job applicant's union status.¹¹ In view of the similarity of the prob-

¹⁰ Subject, of course, to the six-month limitation imposed by Section 10(b) of the Act.

¹¹ The propriety of a reimbursement remedy for hiring arrangements which unlawfully encourage union membership is also involved in the following additional cases, in which Board petitions for certiorari are pending: *National Labor Relations Board v. American Dredging Co.*, 276 F. 2d 286 (C.A. 3), No. 123, this Term; *National Labor Relations Board v. United States Steel Corp.*, 278 F. 2d 896 (C.A. 3, en banc), No. 228, this Term; *National Labor Relations Board v. Local 1566, International Longshoremen's Assn.*, 278 F. 2d 883 (C.A. 3), No. 285, this Term; *National Labor Relations Board v. Local Union No. 85, Sheet Metal Workers Assn.*, 274 F. 2d 344 (C.A. 5), No. 89, this Term; *National Labor Relations Board v. Millwrights' Local 2232*, 277 F. 2d 217 (C.A. 5), No. 229, this Term; *National Labor Relations Board v. Local Union 450, Operating Engineers*, 46 LRRM 2611 (C.A. 5), No. 467, this Term; *Morrison-Knudsen Co. v. National Labor Relations Board*, 275 F. 2d 914 (C.A. 2), No. 120, this Term.

lem in both cases, the instant brief will treat the remedy issue in No. 85 as well.¹²

We will show that a reimbursement remedy for hiring arrangements which unlawfully encourage union membership is within the Board's power under Section 10(c) of the Act, and that thus the reimbursement part of its order here and in No. 85 is entitled to stand.

A. A reimbursement remedy effectuates the policies of the Act and is a reasonable means of redressing the employee rights which were infringed

Section 10(c) of the Act provides that, if the Board finds that a person has committed an unfair labor practice, it shall issue:

* * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

The Board has wide discretion in ordering affirmative action, including the power to require reimbursement of dues and fees paid to a labor organization. As this Court stated in *Virginia Electric and Power Co.*, 319 U.S. 533, in sustaining a reimbursement remedy, such order "should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies

¹² No. 85 is combined with No. 64. The Board's brief in those cases will thus be devoted to the substantive issue raised by No. 64, namely, the validity of the Board's *Mountain Pacific* standards for exclusive hiring arrangements (see Un. Br. in Nos. 64 and 85, p. 50).

of the Act" (at p. 540). No such showing can be made here.

One of the declared policies of the Act is to protect "the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing" (Section 1). This policy is further reflected in Section 7 of the Act, which specifically guarantees these rights to employees, and adds that they shall include "the right to refrain from any or all such activities." There can be no more flagrant impairment of this freedom than to require employees to become union members as a condition of employment. Similarly, a hiring arrangement, such as exists in No. 85, which, although it does not require, leads employees to believe that they have to be a union member to get a job, abridges these employee rights. Accordingly, an order compelling the parties to cease and desist from continuing such practices would clearly effectuate the policies of the Act and hence be within the Board's authority.

However, in "fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience" (*National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. 344, 346). In 1956, finding that, despite the ban which the Taft-Hartley amendments had imposed nine years earlier, closed-shop practices were still rampant,¹³ the Board concluded that a remedy more

¹³ As two disinterested authorities have noted (Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (Univ. of Michigan, 1956), pp. 62, 71):

effective than a cease and desist order was required if such practices were to be curtailed and the statutory policy which they impaired vindicated. Cf. *National Labor Relations Board v. Seven-Up Bottling Co.*, 344 U.S. at 347-348. Drawing upon the precedent established in *Virginia Electric, supra*, the Board decided that an appropriate additional remedy would be to require that monies paid to the union under the illegal arrangement be refunded to the employees.

The Board first announced this decision in *United Association of Journeymen, etc., and Brown-Olds Plumbing & Heating Corp.*, 115 NLRB 594 (1956), a case which involved closed-shop hiring practices similar to those here. The Board stated (at pp. 600-601):

• • • the Taft-Hartley amendments have made unlawful all closed-shop contracts as contrary to public policy; proscribing such conduct by unions as unfair labor practices. The dues

[By 1945], the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.

• • • In all of the strongly unionized areas studied during the summer of 1952, employment arrangements equivalent to those under a closed shop were in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment; in most instances men were employed directly or indirectly through the union itself. *Both parties viewed this as standard practice and showed little or no concern for the illegality of the arrangement.* [Emphasis added.]

See also, the Board's Brief in Nos. 64 and 85, pp. 32-33.

required and collected under such a contract, and all assessments under any contract,¹⁴ contravene that public policy. It is no longer required by the Act that the union be company-dominated in order for collection of dues to be unlawful under a closed shop contract. Here, the dues and assessments were required and collected pursuant to a contract which clearly contravened the public policy of the Act. Dues and assessments here collected constituted the price these employees paid in order to retain their jobs. We therefore conclude that the remedy of reimbursement of all such monies is appropriate and necessary to expunge the illegal effects of the unfair labor practices found here.

* * * *

It is our view that, where payment of dues is required under a closed-shop contract, as where assessments are required under an otherwise valid agreement, reimbursement of such monies actually collected will best effectuate the policies of the Act. Otherwise the very fruits of the unfair labor practice itself will remain in the hands of the respondent * * * [Footnotes omitted].

And, thereafter, the same remedy was extended to hiring arrangements which, though not operated as a closed shop, had the same effect on employees because they failed to contain adequate safeguards that the

¹⁴ Even under the limited type of union-security arrangement permitted by Section 8(a)(3) of the Act, the union is entitled to impose only the obligation "to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership."

union's exclusive control over hiring would be exercised without regard to union membership considerations. *Los Angeles-Seattle Motor Express*, 121 NLRB 1629, 1631 (1958) (this decision is involved in Nos. 64 and 85).

The Board, however, does not apply its reimbursement remedy in every situation where employees have been unlawfully encouraged to join a union, but only in those where, as here and in No. 85, the violation has been of a substantial nature and in obvious disregard of the employees' statutory rights. Thus, in *Philadelphia Woodwork Co.*, 121 NLRB 1642 (1958), issued the same day as *Los Angeles-Seattle*, the Board declined to order the reimbursement of dues and fees paid to a union under a union-security agreement, which, though it afforded employees the 30-day grace period required by Section 8(a)(3), was nevertheless illegal because the union was not in compliance with the filing requirements of Section 9 (f), (g) and (h) when the contract was executed.¹⁵ The Board held that there, unlike the closed shop arrangement in the *Brown-Olds* case which constituted a flagrant impairment of employee rights in open defiance of statutory policy, the substantive content of the union-security clause did not exceed the permissible limits of the statute and the violation found was only "technical in nature" (121 NLRB at 1645). Similarly, in *Chun-King Sales, Inc.*, 126 NLRB No. 98 (1960), 45 LRRM 1392, the Board declined to order a reimbursement

¹⁵ This condition for the validity of union-security agreements has been eliminated by the 1959 amendments to the Act. 73 Stat. 519, Sec. 201 (d), (e).

remedy where the union-security provision, although it did not require employees to be union members to get a job, gave them less than the full 30 days permitted by Section 8(a)(3) to decide whether they desired to join. The Board distinguished the situation in which the *Brown-Olds* reimbursement remedy was applied on the ground that here, unlike there, the union-security clause "does not either condition initial employment upon union membership, or in any way grant to the Union control over the hiring of employees" (45 LRRM at 1394).¹⁶ And recently, in *Hooker Chemical Corporation*, 128 NLRB No. 133 (1960), 46 LRRM 1447, where the Board again refused to order reimbursement where the union-security provision was invalid only because of the union's non-compliance with the former filing requirements, it summed up its position as follows (46 LRRM at 1449):

* * * the Board does not hold that every invalid union security agreement warrants application of such a remedy. Rather the Board has held that a *Brown-Olds* reimbursement remedy is warranted where the agreement or practice makes union membership or union clearance a condition of obtaining employment and that such remedy is not warranted where, as here, the agreement or practice is unlawful for some reason not involving a limitation on the right to obtain employment. [Footnotes omitted.]

¹⁶ See also, *Nordberg-Selah Fruit, Inc.*, 126 NLRB No. 89 (1960), 45 LRRM 1381; *Orfeo Kostrencich*, 127 NLRB No. 10 (1960), 45 LRRM 1500.

.. It is apparent that employers and unions would be more reluctant to enter into or continue illegal hiring arrangements if they know that they will be required to refund monies collected thereunder, than they would be, if the risk were merely a cease and desist order. From this standpoint, the reimbursement remedy for hiring arrangements which give the union an unlawful control over initial employment thus effectuates the statutory policy described p. 17, *supra*. Of course, "it is not enough to justify the Board's requirements to say they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterring effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end." *Republic Steel Corp. v. National Labor Relations Board*, 311 U.S. 7, 12. The remedy must, in addition, be reasonably related to the right which it purports to vindicate. Cf. *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 236. A reimbursement remedy for illegal hiring arrangements satisfies this test too.

Where, as here, employees are required to be union members to obtain jobs, or where, as in No. 85, they are led to believe that this is necessary, they are, as noted previously, encouraged to become union members, or, if they are members, to retain that membership in good standing. The way in which union membership is acquired or maintained is by paying initiation fees and periodic dues to the union. Accordingly, there is a causal connection between the

unfair labor practice of requiring or inducing employees to become or remain union members in good standing to get a job, and the payment of dues and fees to the union. The unfair labor practice is such that, irrespective of whether these monies would have been paid for other reasons, it insures, by at least furnishing strong additional encouragement, that they will in fact be paid. At the same time, a refund of the dues and fees paid under the illegal arrangement is a fair measure of the unfair labor practice, because this is exactly what it cost the employee to acquire or maintain his union membership in good standing and thus obtain his job.

In sum, a refund of dues and fees paid to the union in order to secure employment merely "returns to the employees what has been taken from them" under the illegal practice and thereby restores "to the employees that truly unfettered freedom of choice which the Act demands" (*Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533, 541). Moreover, insofar as other employees may have been deterred by the illegal union membership requirement from seeking employment with the particular employer, the reimbursement of dues and fees to the employees who were required to pay them in order to get jobs affords the former convincing assurance that their statutory rights will be protected and thus tends to encourage them to seek employment which they would not otherwise deem attainable.

For these reasons, the court below and the First Circuit in *National Labor Relations Board v. Local 111, United Brotherhood of Carpenters*, 278 F. 2d 823,

have held that a refund of dues and fees is a permissible remedy for a hiring arrangement which conditions employment upon union membership.¹⁷ The remedy, however, has been rejected by other circuits in situations similar to those here and in No. 85 (Un. Br. 12-14; n. 11, *supra*). We submit that these decisions rest on fundamental misconceptions concerning the scope of the Board's remedial power and the holding of this Court in *Virginia Electric, supra*.

B. If the propriety of the reimbursement remedy is dependent on a showing that the dues and fees were coerced, such a showing can be made. However, proof of coercion is not essential.

The basic reason for the conclusion that reimbursement of union dues and fees is an inappropriate rem-

¹⁷ Contrary to petitioners' suggestion (Br. 42, n. 7), the First Circuit did not simply enforce the reimbursement order because no exceptions were filed thereto. Despite the absence of exceptions, it undertook to determine the question on the merits. Thus, the court (in an opinion by Judge Aldrich), after noting that it declined to enforce a reimbursement order in *National Labor Relations Board v. Local 176, United Brotherhood of Carpenters*, 276 F. 2d 583, 586, which involved an exclusive hiring hall agreement that did not have the Board's *Mountain Pacific* safeguards, stated, (278 F. 2d at 825):

The findings in the case at bar go far beyond that. * * * An open-ended list whereby local members coming in later are placed ahead of non-members waiting for work simply because they are local members is the clearest kind of illegal preference. * * * In the light of such bare-faced, fundamental violation, the disgorgement order is not governed by our decision in *Local 176*. On the contrary, we could refuse to enforce the Board's order only if it must be ruled that the Board could never determine such relief to be proper. We would not so hold. *N.L.R.B. v. Local 60* * * *, 7 Cir., 1960, 273 F. 2d 699; cf. *Virginia Electric & Power Co. v. N.L.R.B.*, 1943, 319 U.S. 533.

edy for a hiring arrangement which unlawfully encourages union membership is that where the employees involved are already union members, it cannot be found that the illegal arrangement *actually coerced* them into paying dues and fees to the union. That is, it is assumed that the Board may order dues and fees to be refunded only if they were exacted involuntarily. It is then argued that no showing of actual coercion can be made where, as here and in No. 85, the employees appear to have joined the union before they were ever subjected to the illegal hiring arrangement in question. For, since employees join a union to obtain benefits and not merely to avoid discrimination, long-time union members would in all probability continue to pay dues and fees irrespective of the conditions imposed by the hiring arrangement (Un. Br. 14-28).

1. Assuming that a showing of actual coercion is necessary, it does not follow that, just because an employee was a union member before he is subjected to a hiring arrangement which unlawfully encourages union membership, the arrangement will have no coercive effect on him. As the court below noted (R. 118-119), the illegal arrangement here requires the employee to *retain* his union membership in order to obtain and keep employment,¹⁸ thereby depriving him of his right to refrain from union activity without imperiling his job opportunities. See *Radio Officers' Union v. National Labor Relations Board*, 347 U.S.

¹⁸ Similarly, the hiring arrangement in No. 85 leads a union employee to believe that his membership must be maintained to get referred for work.

17, 39-40. Nor is it "fanciful," as petitioners contend (Un. Br. 21-22), to expect that a long-time union member might cease paying dues to the union once it was evident that such payments were no longer necessary to obtain employment. Petitioners overlook the fact that in an industry like the construction industry, where closed shop practices have a long history,¹⁹ one of the chief reasons for joining the union was to obtain a job.²⁰ The Taft-Hartley amendments, which abolished the closed shop, were, of course, designed to free building trades employees from this compulsion no less than other employees.²¹ A hiring arrangement which does not condition employment on union membership would not only further that objective, but would thus eliminate a significant "inclination that

¹⁹ See Haber, *Industrial Relations in the Building Industry* (Harvard, 1930), pp. 238-240, 245; Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (Univ. of Michigan, 1956), pp. 62, 71.

²⁰ This also holds true for No. 85, for, as shown in our brief in Nos. 64 and 85 (pp. 30-33), in industries where jobs are obtained through union controlled hiring halls the closed shop historically has been an adjunct of the hiring hall.

²¹ See S. Rep. No. 105, 80th Cong., 1st Sess., pp. 5-7, Leg. Hist. of the Labor Management Relations Act, 1947 (G.P.O., 1948), pp. 411-412.

Nor is a different conclusion required by Section 8(f), added by the 1959 amendments (Un. Br. 29). Although Congress there permitted an employer in the building and construction industry to recognize a union as the representative of his employees prior to their actual hire, it did not relax the ban on requiring union membership as a condition of employment. It merely shortened, from 30 to 7 days, the period afforded to employees, under the limited type of union-security permitted by Section 8(a)(3), to decide whether they desired to join the union after obtaining employment (Section 8(f)(2)).

prompted [the employee] to join" in the first place (Un. Br. 22). On the other hand, so long as the job motive for maintaining union membership persists, it cannot be said with certainty—particularly since employee testimony under these circumstances would be of little probative value²²—that the other reasons for joining a union would in themselves be sufficient to induce the employee to continue his dues payments to the union.²³ Accordingly, it is fair to conclude that the illegal hiring arrangement here did exert a coercive impact on the employees though they may already have been union members, inducing them to retain

²² A "sense of constraint . . . is a subtle thing, and the recognition of constraint may call for a high degree of introspective perception." *National Labor Relations Board v. Donnelly Garment Co.*, 330 U.S. 219, 231. See also, *Radio Officers' Union v. National Labor Relations Board*, 347 U.S. 17, 51.

²³ The statistics cited by petitioners (Br. 17) showing that employees overwhelmingly authorized union shops when they were polled on this issue under Section 9(e) of the Act, do not impair the above analysis. Such elections were held only after the employees had first been hired without regard to union membership and had then freely selected the union as their representative. It is one thing to regard a decision to pay dues to a union as voluntary in that situation, and quite another to regard it as voluntary where, as here, entry to the job itself was contingent upon union membership in good standing.

Likewise irrelevant are the election results in the *American Dredging* case (Un. Br. 22-23, n. 28). For, in view of the Third Circuit's refusal to enforce the reimbursement remedy (the propriety of which is before this Court in No. 123), the election was held under circumstances which the Board would not ordinarily regard as adequate to insure a free choice. In other words, had the Board been able to require a refund of dues and fees prior to the election, the election results might well have been different.

that membership in good standing in order to obtain and keep their jobs." Cf. *National Labor Relations Board v. Remington Rand, Inc.*, 94 F. 2d 862, 872, certiorari denied, 304 U.S. 576.

2. In any event, we submit that proof that the illegal hiring arrangement coerced employees into paying dues and fees to the union is not necessary to

²⁴ Petitioners misconceive the basis for the Board's unfair labor practice finding in the hiring hall cases, in contending (Br. 24) that the justification for a refund order in No. 85 is even less than that in the instant case. Thus, petitioners assert that, in the Board's view, the delegation of exclusive hiring authority to a union is unlawful because it may be presumed that "the union will operate the referral system discriminatorily"; the addition of the *Mountain Pacific* safeguards would not cure such a propensity to discriminate, and hence the presence or absence of such safeguards can have no bearing on whether employees would be more or less likely to pay dues to the union. However, as more fully set forth in our brief in No. 64, the Board's *Mountain Pacific* doctrine does not rest on presumed union discrimination. In the Board's view, the mere existence of an exclusive hiring hall constitutes discrimination within the meaning of Section 8(a)(3) because it denies employment to employees who seek work directly, without going through the hiring hall. This discrimination, moreover, would tend to encourage union membership, thereby adding the second element required for a violation of Section 8(a)(3). The *Mountain Pacific* standards come in with respect to the latter element, i.e., by affording adequate assurance to employees that the union's power will be exercised without regard to union considerations, they negate the unlawful encouragement which would otherwise flow from the existence of the hiring hall itself. Since the *Mountain Pacific* standards thus affect the amount of union encouragement generated by the vesting of exclusive hiring authority in the union, their presence or absence would influence the employees to join the union and pay dues to it, and old-time members to retain their membership in good standing, to the same extent as would the presence or absence of the closed shop arrangement involved here. See also, n. 20, p. 26, *supra*.

sustain a reimbursement order. For, as we read *Virginia Electric and Power Co. v. National Labor Relations Board*, 319 U.S. 533, it holds that a reimbursement order may be proper without a showing that, but for the unlawful discrimination, any particular recipient of reimbursed monies would not have paid them.

In *Virginia Electric*, the Board, as a remedy for a situation where the employer had given a closed-shop contract to a union established in violation of Section 8(a)(2), ordered that the employer cease giving effect to the contract and reimburse the employees for dues which had been checked off in favor of the union. In opposition to the reimbursement order, it was contended that, since the employees had voluntarily authorized the check-off and they had received substantial benefits from the union, a return of the money to them would be a windfall absent proof, in each individual case, that the money was actually paid unwillingly. This issue split the Court three ways. The dissenting justices (319 U.S. at 546-550) agreed that a specific showing of coercion was required, and voted to set aside the reimbursement order because such showing had not been made. Mr. Justice Frankfurter, who went with the majority, wrote a special concurrence (*id.*, at 545-546), on the ground that, though a specific showing of coercion was required, the closed-shop contract established the requisite coercion. The remaining five members of the majority, however, in an opinion written by Mr. Justice Murphy, held that the propriety of the reimbursement order did not turn on whether "damages [were] actually sustained" by each beneficiary; that this position wrongly conceives

of the reimbursement order as "compensation for private injury" (319 U.S. at 543). In their view, rather, the remedy should be sustained "unless it can be shown that [it] is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (*id.*, at 540). And, applying that test, they concluded that no such showing could be made there.

Thus, the opinion for the Court in *Virginia Electric* states (319 U.S. at 543):

The instant reimbursement order is not a redress for a private wrong. Like a back pay order, it does restore to the employees in some measure what was taken from them because of the Company's unfair labor practices. In this, both these types of monetary awards somewhat resemble compensation for private injury, but it must be constantly remembered that both are remedies created by statute—the one explicitly and the other implicitly in the concept of effectuation of the policies of the Act—which are designed to aid in achieving the elimination of industrial conflict. They vindicate public, not private, rights * * *. For this reason it is erroneous to characterize this reimbursement order as penal or as the adjudication of a mass tort. It is equally wrong to fetter the Board's discretion by compelling it to observe conventional common law or chancery principles in fashioning such an order, or to force it to inquire into the amount of damages actually sustained. Whether and to what extent such matters should be considered is a complex problem for the Board to decide in the light of its administrative experience and

knowledge. The Board has here determined that the employees suffered a definite loss in the amount of the dues deducted from their wages and that the effectuation of the policies of the Act requires reimbursement of those dues in full. We cannot say this considered judgment does not effectuate the statutory purpose.

In short, as we read the majority opinion in *Virginia Electric*, the validity of a reimbursement order is not contingent upon a showing that the employees paid monies to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies. For the employees may be deemed to have suffered a "loss" by being subjected to an arrangement which impairs their statutory rights. That is, even assuming that many of the employees in this case would not have dropped out of the Union had they not been under compulsion to stay in, the fact would remain that the Company and the Union had entered into an arrangement violative of the Act's guarantee against discrimination, and that dues and fees had been paid by employees, willingly or not, pursuant to the illegal arrangement. That the money may have been collected anyhow by a legal means does not privilege the use of an illegal procedure to obtain it. Nor does this circumstance militate against a remedy which will fully and effectively neutralize the impact of the illegality and vindicate the public rights conferred by the Act. And, as we have shown (pp. 17-20), a reimbursement order is necessary to achieve this result with respect to illegal hiring arrangements.

To be sure, the union in *Virginia Electric* was company dominated, whereas those here and in No. 85 are not. But, for the reasons advanced above, we believe that, contrary to the view of petitioners and the courts which have distinguished *Virginia Electric* on that ground (Un. Br. 44-47), the opinion of the Court does not turn on the company domination. The domination of the union was simply the unfair labor practice which brought the Board's remedial power into play. Collection of dues by and on behalf of a dominated union was a means of furthering such unfair labor practice, and thus the Board could appropriately require reimbursement of such monies. Here, closed-shop practices are the violation which the Board is required to remedy. And, here too, collection of fees and dues are an integral aspect of, and means of implementing, the illegal arrangement. Hence, the reimbursement remedy is equally appropriate here. Perhaps, the dominated nature of the union emphasized the flagrant impairment of employee rights and statutory policy which had occurred in that case, and thus made it easier to see that a reimbursement remedy was necessary to redress the wrong. However, though the hiring practices here may have infringed these rights and policies less dramatically, they have nonetheless done so in a substantial manner, and, as we have shown, a reimbursement remedy is needed adequately to correct the situation. In these circumstances, we read *Virginia Electric* as privileging a reimbursement remedy, even though the union involved is not company dominated.

This conclusion is supported by the cases (Un. Br. 46-47, n. 44) in which a reimbursement remedy has been sustained without a showing of that factor. Thus, in *National Labor Relations Board v. Revere Metal Art Co.*, 280 F. 2d 96 (C.A. 2), petition for certiorari pending on another point, No. 412, this Term, the employer recognized a minority union and gave it a contract requiring employees to join the union. The Board, finding that this contract was violative of the Act, ordered the employer and the union to reimburse the employees for dues and fees paid to the union while the contract was in effect, including those employees who had joined the union prior to September 1, when the contract became effective. The Second Circuit, though declining to enforce a reimbursement order in the situation here,²⁵ nevertheless enforced the order in *Revere*. The court stated (280 F. 2d at 101):

* * * For the courts to require a determination of the attitude of each employee in every case would impose impossible administrative burdens * * *. We have been admonished that although orders requiring reimbursement to employees for dues paid to unions unlawfully forced upon them "somewhat resemble compensation for private injury," we must not consider them solely in that light since "they vindicate public, not private rights." *Virginia Electric & Power Co. v. NLRB*, 1943, 319 U.S. 533, 543 * * *. The fact that the

²⁵ *Morrison-Knudsen Co. v. National Labor Relations Board*, 275 F. 2d 914 (C.A. 2), petition for certiorari pending, No. 120, this Term.

union imposed in the *Virginia Electric* case was company-dominated does not appear to be a valid distinction here * * *, and we see no other * * *²⁶

C. The reimbursement remedy is proper though it does not take into account the benefits which the employees may have received from the dues and fees paid to the union

Petitioners further contend (Br. 29-32) that the Board's reimbursement order is invalid because it fails to deduct the benefits which the employees may have obtained from the union as a result of the dues and fees paid. This contention is likewise answered by *Virginia Electric*: In rejecting the argument that the employees had received some benefits from the Union there, which had obtained a substantial wage increase for them, the Court stated (319 U.S. at 544): "it is manifestly impossible to say that greater benefits might not have been secured if the [employees'] freedom of choice * * * had not been interfered with." And, it added (*ibid.*): "The fact that the Board may only have approximated its efforts to make the employees whole, because of asserted benefits of dubious and unascertainable nature flowing from the [union], does not convert this reimbursement order into the imposition of a penalty."

Moreover, even if the benefits "purchased" with

²⁶ See also, *National Labor Relations Board v. Local 294, International Brotherhood of Teamsters*, 279 F. 2d 83, 86-88 (C.A. 2); *Paul M. O'Neill v. National Labor Relations Board*, 46 LRRM 2503 (C.A. 3); *Dixie Bedding Co. v. National Labor Relations Board*, 268 F. 2d 901, 907 (C.A. 5); *Local Lodge No. 1424 v. National Labor Relations Board*, 264 F. 2d 575, 582 (C.A. D.C.), reversed on other grounds, 362 U.S. 411.

the fees and dues paid to the union could be accurately ascertained, the Board would still be warranted in not deducting their cost from the sums required to be refunded. The monies collected under the illegal hiring arrangement went for a group of benefits, which were not severable. That is, along with a job, the employee may have obtained certain other union benefits. But, he could not pick and choose what he would receive for the dues and fees paid; he bought either the whole package or none of it. Since the hiring arrangement was an illegal means of exacting the fees and dues, it could not have been used to purchase any part of the package, no matter how beneficial. It could scarcely be suggested, for example, that, in a closed shop situation, such as existed here, the wages earned from the job obtained under the illegal system should be deducted from the dues refunded to the employee simply because the job and the wages were a benefit of union membership; the other benefits obtained stand on no different footing. Therefore, it is proper that a refund of the entire amount collected pursuant to the illegal arrangement be ordered, without any allowance for collateral benefits obtained.

Moreover, it should be noted that the employees suffered injury which the Board's order does not seek to remedy in a monetary sense, which may well offset any advantage gained from not deducting the cost of collateral benefits from the amount of dues and fees refunded. The Board's order seeks only to restore monies collected under the illegal arrangement. It does not undertake to evaluate or remedy

by reimbursement the additional loss sustained by the employees from the deprivation of their statutory right to refrain from union activities, if they so desired, or to select a representative of their own choice. "Since no consideration has been given * * * to collateral losses in framing an order to reimburse employees * * *, manifestly no consideration need be given to collateral benefits which employees may have received." *Gullett Gin Company v. National Labor Relations Board*, 340 U.S. 361, 364.

Nor can petitioners be relieved of the responsibility for refunding dues and fees which were unlawfully collected by pleading hardship (Un. Br. 30-31). There is no reason to believe that the amount required to be refunded in this case will reach the astronomical proportion envisaged by the AFL-CIO in its Amicus Brief (pp. 18-19); see also Un. Br. 34. The reimbursement order here is limited to those employees whom Mechanical Handling obtained from petitioners, including Local 60, pursuant to the illegal arrangement involved in this case (R. 7-8). So far as appears from the record, employees were obtained from Local 60 only for the Ford job. Moreover, it appears that the Company's work at the Ford plant lasted about 6 months and during that time about 25 millwrights were employed (R. 40, Tr. 92). Assuming, as is unlikely, that all 25 were employed for the full period, and, accepting petitioners' assumption that they were old-time union members and thus had paid initiation fees to the union more than six months prior to the filing of the charges herein and before being subjected to the illegal ar-

arrangement, a refund would appear to be required of only the dues they paid to the union during the period of the Ford job. This would total about \$525.00.²⁷ In any event, if petitioners experience difficulty in raising the money required to be refunded, this is a problem which can be worked out at the compliance stage.²⁸

CONCLUSION

For the foregoing reasons, the judgment of the court below enforcing the reimbursement provisions of the Board's order should be affirmed. Moreover, the judgment of the Court in No. 85, denying enforcement of the reimbursement provisions of the Board's order in that case, should be reversed.

Respectfully submitted.

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National Labor Relations Board.

I authorize the filing of this brief.

J. LEE RANKIN,
Solicitor General.

OCTOBER 1960.

²⁷ Monthly dues were \$3.50 (R. 95).

²⁸ In the past, where reimbursement orders have proved burdensome to a respondent, arrangements have been negotiated, including installment payment plans.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth on p. 2, *supra*, are as follows:

FINDINGS AND POLICIES

SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of

competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

* * * * *

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

UNFAIR LABOR PRACTICES

SEC. 8. * * *

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

SUPREME COURT OF THE UNITED STATES

No. 68.—OCTOBER TERM, 1960.

Local 60, United Brotherhood
of Carpenters and Joiners of
America, AFL-CIO, et al.,
—Petitioners,

v.

National Labor Relations Board.

On Writ of Certiorari
to the United States
Court of Appeals for
the Seventh Circuit.

[April 17, 1961.]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, United Brotherhood, entered into a contract with Mechanical Handling Systems, Inc. (which we will call the Company), whereby the Company agreed to work the hours, pay the wages, abide by the rules and regulations of the union applicable to the locality where the work is done, and employ members of the union.

The Company, undertaking work at Indianapolis, agreed to hire workers on referral from a local union, one of the petitioners in this case. Two applicants from another local union were denied employment by the Company because they could not get referral from petitioner local union.

The Board found that petitioners had violated § 8 (b) (1) (A) and § 8 (b) (2) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 141, as amended, 29 U. S. C. § 158, in maintaining and enforcing an agreement which established closed shop preferential hiring conditions and in causing the Company to refuse to hire the two applicants. 122 N. L. R. B. 396.

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After granting other relief the Board said:

"As we find that dues, non-membership dues, assessments, and work permit fees,¹ were collected under the illegal contract as the price employees paid in order to obtain or retain their jobs, we do not believe it would effectuate the policies of the Act to permit the retention of the payments which have been unlawfully exacted from the employees."

It added that the remedial provisions "are appropriate and necessary to exchange the coercive effect" of petitioners' unfair labor practices.

On application of the Board, the Court of Appeals enforced the order. 273 F. 2d 699. The case is here on a writ of certiorari, 363 U. S. 837, in which petitioners challenge no part of the Board's order except the refund provision.

The provision for refund in this case is the product of a rule announced by the Board in the *Brown-Olds* case, 115 N. L. R. B. 594, which involved the use of a closed-shop agreement despite the ban in the Taft-Hartley Act. In that case a panel of three members of the five-member Board found a violation of the closed-shop provision of the Act. Two of the three agreed to an order of reimbursement to all employees for any assessments collected by the union within the period starting from six months prior to the date of the filing of the charge. One member, Ivar H. Peterson, dissented, saying that the reimbursement was inappropriate since there was an absence of "specific evidence of coercion and evidence that payments

¹ The monthly dues payable to the local union were \$3.50 and the initiation fee \$125. Dues and fees in lesser amounts were payable by apprentices. A member who is working within the jurisdiction of a district council who has not transferred his membership to a local union of the council pays for a working permit that is not less than 75 cents a month nor more than the local monthly dues.

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were required as a condition of employment." *Id.* 606. Later that remedy was extended to hiring arrangements, which, though not operating in connection with a closed shop, were felt by the Board to have a coercive influence on applicants for work to join the union. *Los Angeles-Seattle Motor Express, Inc.*, 121 N. L. R. B. 1629.

In neither of those cases nor in the present case was there any evidence that the union membership, fees, or dues were coerced. The Board as well as the Court of Appeals held that fact to be immaterial. Both said that the case was governed by *Virginia Electric Co. v. Labor Board*, 319 U. S. 533; and the Court of Appeals added that coercion was to be inferred as "there was present an implicit threat of loss of job if those fees were not paid." 273 F. 2d, at 703. The Board argues, in support of that position, that reimbursement of dues where hiring arrangements have been abused is protective of rights vindicated by the Act and authorized by § 10 (c).²

We do not think this case is governed by *Virginia Electric Co. v. Labor Board*, *supra*. That case involved a company union whose very existence was unlawful. There were, indeed, findings that the union "was not the result of the employees' free choice" (319 U. S., at 537), and that the employees had to remain members of the union to retain their jobs. *Id.*, 540. Return of dues was one of the means for disestablishing an unlawful

Section 10 (c) provides in relevant part:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act:

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union. *Id.*, 541. Cf. *Labor Board v. Mine Workers*, 335 U. S. 453, 458-459.

The unions in the present case were not unlawfully created. On the record before us they have engaged in prohibited activity. But there is no evidence that any of them coerced a single employee to join the union ranks or to remain as members. All of the employees affected by the present order were union members when employed on the job in question. So far as we know they may have been members for years on end. No evidence was offered to show that even a single person joined the union with the view of obtaining work on this project. Nor was there any evidence that any who had voluntarily joined the union was kept from resigning for fear of retaliatory measures against him. This case is therefore quite different from *Radio Officers v. Labor Board*, 347 U. S. 17, 48, where, discrimination having been shown, the inferences to be drawn were left largely to the Board.

The Board has broad discretion to adapt its remedies to the needs of particular situations so that "the victims of discrimination" may be treated fairly. See *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194. But the power of the Board "to command affirmative action is remedial, not punitive, and is to be exercised in aid of the Board's authority to restrain violations and as a means of removing or avoiding the consequences of violation where those consequences are of a kind to thwart the purposes of the Act." *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 236. Where no membership in the union was shown to be influenced or compelled by reason of any unfair practice, no "consequences of violation" are removed by the order compelling the union to return all dues and fees collected from the members; and no "dissipation" of the effects of the prohibited action is achieved. *Labor Board v. Mine Workers*, *supra*, 463. The order in those circumstances becomes punitive and

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beyond the power of the Board.³ Cf. *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 10. As Judge Pope said in *Morrison-Knudsen Co. v. Labor Board*, 276 F. 2d 63, 76, "reimbursing a lot of old-time union men" by refunding their dues is not a remedial measure in the competence of the Board to impose, unless there is support in the evidence that their membership was induced, obtained, or retained in violation of the Act. It would be difficult, even with hostile eyes, to read the history of trade unionism except in terms of voluntary associations formed to meet pressing needs in a complex society.⁴

Reversed.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

³ Accord: *Morrison-Knudsen Co. v. Labor Board*, 275 F. 2d 914 (C. A. 2d Cir.); *Labor Board v. United States Steel Corp.*, 278 F. 2d 896 (C. A. 3d Cir.); *Labor Board v. Local Union No. 85*, 274 F. 2d 344 (C. A. 5th Cir.); *Labor Board v. International Union*, 279 F. 2d 951 (C. A. 8th Cir.); *Morrison-Knudsen Co. v. Labor Board*, 276 F. 2d 63 (C. A. 9th Cir.); *Local 357 v. Labor Board*, 275 F. 2d 646 (C. A. D. C. Cir.). Cf. *Labor Board v. Carpenters Local*, 276 F. 2d 583 (C. A. 1st Cir.); *Perry Coal Co. v. Labor Board*, 284 F. 2d 810 (C. A. 7th Cir.).

⁴ See Millis and Montgomery, *Organized Labor*, Vol. III (1945), c. VIII.

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[April 17, 1961.]

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, concurring.

While I agree with the Court that *Virginia Electric & Power Co. v. Labor Board*, 319 U. S. 533, does not justify the Board's "Brown-Olds" remedy as it has been applied in this and other cases, I think the Board is entitled to be informed more fully why that should be so, since it may fairly be said that *Virginia Electric* could be taken as having invited the course the Board has been following. In joining the Court's opinion I shall therefore add some further views.

The Brown-Olds remedy is an order made under § 10 (c) of the National Labor Relations Act which authorizes the Board, after finding an unfair labor practice, not only to issue a cease and desist order but also "to take such affirmative action . . . as will effectuate the policies of this Act. . . ." The remedy, which seems only to be applied if the unfair labor practice amounts either to employer domination of a union [§ 8 (a) (2)] or discrimination in favor of union membership by an agreement between employer and union [§ 8 (a) (3); § 8 (b) (2)], typically requires that either the union or the employer reimburse all employees in the amount of all moneys paid in dues, assessments, etc., since six months before the unfair labor practice charge was filed. The

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Board does not admit defensive evidence that some employees voluntarily made such payments. An illegal closed shop or discriminatory hiring practices create an irrebuttable presumption of coercion. See, e. g., *Brown-Olds Plumbing & Heating Corp.*, 115 N. L. R. B. 594; *Saltsman Construction Co.*, 123 N. L. R. B. 1176; *Nassau & Suffolk Contractors' Assn.*, 123 N. L. R. B. 1393; *Lummus Corp.*, 125 N. L. R. B. 1161.

The provision that the Board was to be allowed "to take such affirmative action . . . as will effectuate the policies of this Act . . ." did not pass the Wagner Act Congress without objection to the uncontrolled breadth of this power. See Hearings before Senate Committee on Education and Labor on S. 1958, 74th Cong., 1st Sess. 448-449. This Court's construction of the scope of the power has reflected a similar concern. The Board has been told that it is without power to "effectuate the policies of this Act" by assessing punishments upon those who commit unfair labor practices. *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 11, 12. The primary purpose of the provision for other affirmative relief has been held to be to enable the Board to take measures designed to recreate the conditions and relationships that would have been had there been no unfair labor practice. *Consolidated Edison Co. v. Labor Board*, 305 U. S. 197, 236. Thus in *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, this Court reversed the Board for refusing to allow an employer to show in mitigation of a back-pay order that the employee unjustifiably refused to take desirable new employment during the period. In *Republic Steel, supra*, the Court refused to enforce an order requiring the employer to pay the full amount of back pay to an employee who had been paid to work for the Work Projects Administration in the meantime. In *Labor Board v. Seven-Up Co.*, 344 U. S. 344, the Court indicated that even an otherwise sensible procedure for com-

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putting back pay of an employee discriminatorily discharged must provide exceptions where the scheme would more than compensate the employee because of the seasonal nature of the employer's business.

The Board now emphasizes that its Brown-Olds remedy has a substantial tendency to deter employer-union encouragement of union membership in violation of §§ 8 (a) (3) and 8 (b) (2). But it also correctly recognizes that in light of the *Republic Steel* case, *supra*, it must show more than that the remedy will tend to deter unfair labor practices. The Board must establish that the remedy is a reasonable attempt to put aright matters the unfair labor practice set awry. As I understand its contentions, the Board attempts to make this showing by arguing that wherever there has been a not insignificant unlawful encouragement to union membership all members should be taken to have been under the influence of coercion, whether or not they were aware of this influence or would have acted differently without it. The employees are said to have been coerced in much the same sense that a man contentedly sitting in the living room of his house may be said to be imprisoned by the barring of the doors whether or not he wants to leave. Accordingly, the Board has considered unnecessary an actual showing of employee unwillingness to belong to the union.

It is but another formulation of the same argument when the Board, in its brief, states that actual coercion is not required so long as the dues are collected pursuant to an illegal system: "The validity of a reimbursement order is not contingent upon a showing that the employees paid monies to the union unwillingly. If the money were paid pursuant to an arrangement which violated the statute, it can be ordered refunded provided this would best effectuate the statutory policies. . . . That the money may have been collected anyhow by a legal means does not privilege the use of an illegal procedure to obtain it."

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What we must decide, then, is whether it is within the power of the Board to provide dues-reimbursement relief for this type of imputed coercion, or, as the Board alternatively states its case, for the employee's loss of his statutory right to decide freely whether or not he shall be a union member. This issue is not satisfactorily resolved by simply pointing out that there has been no showing of forced payment of dues an employee was unwilling to pay, for, unless I misunderstand the Board, it is arguing that even a willing union member loses something when there is a violation of § 8 (b) (2), namely the freedom of choice which the statute assures him. Nor, once we have recognized that a tendency to deter unfair labor practices is not alone sufficient justification for a Board order of affirmative relief, does the concept of punitiveness really advance a solution. Deterrence is certainly a desirable, even though not in itself a sufficiently justifying effect of a Board order.

I think the Board should be denied the use of its Brown-Olds remedy in situations where, as here, it is not unlikely that a substantial number of employees were willing to pay dues for union membership because, as I see it, the amount of dues or other exactions paid is not a tenable way of estimating the value a willing union member would place on his right to choose freely whether or not he would be or remain a union member—as it were, on his right to change his mind. The amount of dues paid does perhaps provide a means of estimating the value of benefits received from the union. Or the amount of dues paid does perhaps measure the cost coercion imposes upon an employee who, if free to choose, would be unwilling to join the union (although even in this case a proper adjustment might have to take some account of the union benefits the employee would not have received had he been merely a nonunion employee in a unionized bargaining unit). But I can find no rational relationship at all

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between the amount of dues paid and the value an employee, who is willing to join a union, would place on his freedom to change his mind.² In the absence of a showing of such a relationship the Board's Brown-Olds order can no more be sustained than could its orders in the *Phelps Dodge* or *Republic Steel* cases.

A different result might follow in this case if *Virginia Electric* had held that such a relationship exists. But I think that case held only that, as a matter of statutory policy, an employee could not ever be deemed a willing member of a company dominated union, cf. *Matter of The Carpenter Steel Co.*, 76 N. L. R. B. 670, and that, on considerations of practicality, the employer who had violated the Act should bear the unapportionable costs of sustaining a union that served the employer's forbidden purposes at least as much as it served the employee's legitimate ones.

² For example, an employee may be more willing to join a union which charges high dues and provides substantial benefits than a union which charges little and gives little. But the Board formula declares that in the case where the dues are higher the value of the loss of freedom of choice is greater.



SUPREME COURT OF THE UNITED STATES

No. 68.—OCTOBER TERM, 1960.

Local 60, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, et al., Petitioners, v. National Labor Relations Board,	}	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.
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[April 17, 1961.]

MR. JUSTICE WHITTAKER, dissenting.

The contract involved here not only required persons seeking employment in the unit to be members of the union, but also required each of them to obtain from the "Council" and present to the "union steward" on the job a "work permit" before going to work. That this closed-shop hiring arrangement "coerce[d] employees in the exercise of the rights guaranteed in section 7," and "cause[d] [the] employer to discriminate against . . . employee[s] in violation of subsection (a)(3) of" the Act, contrary to the explicit provisions of §§ 8 (b)(1)(A) and 8 (b)(2) of the Act, 29 U. S. C. § 158, is not here denied.

To assure protection and enforcement of the rights it had guaranteed to employees by the Act, Congress provided in § 10 (c) that, upon the finding of an "unfair labor practice," "the Board shall state its findings of fact and shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action . . . as will effectuate the policies" of the Act.

Finding that the closed-shop hiring arrangement involved here violated §§ 8 (b)(1)(A) and 8 (b)(2) of the Act and thus constituted an unfair labor practice, the

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Board, in fashioning a remedy which it deemed "necessary to expunge the coercive effect" of the violations and to "effectuate the policies of the Act," ordered the unions not only to cease the violations but also "to refund to the employees involved the dues . . . and work permit fees paid by the employees as a price for their employment." The only question here is whether that remedy was within the Board's power. Like the Court of Appeals, I think it was.

Congress knew, of course, that it could not foresee the nature of all possible violations of the Act, and accordingly did not undertake to specify the precise remedy to be visited upon offenders for particular violations.

"[I]n the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. The exercise of the process was committed to the Board, subject to limited judicial review. Because the relation of remedy to policy is peculiarly a matter for administrative competence, courts must not enter the allowable area of the Board's discretion . . .

"The Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies. It entrusts to an expert agency the maintenance and promotion of industrial peace. *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 194.

To hold that the Board is without power to do more than order the unions not to violate the Act in the future would be to deny any remedy whatever for violations.

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It is certain that Congress did not intend by the Act "to hold out to [employees] an illusory right for which it was denying them a remedy." *Graham v. Brotherhood of Firemen*, 338 U. S. 230, 240. In directing the Board to order "such affirmative action . . . as will effectuate the policies of the Act," Congress seems clearly to have directed the Board "to fashion and enforce a remedy, which it . . . deem[s] adequate to that end." *Republic Steel Corp. v. Labor Board*, 311 U. S. 7, 12.

In "fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board v. Seven-Up Bottling Co.*, 344 U. S. 344, 346. And see *Radio Officers Union v. Labor Board*, 347 U. S. 17, 49. Based on its long experience up to 1956, that, despite the ban which the Taft-Hartley Amendments had imposed nine years earlier, closed-shop practices were still being followed in some industries, the Board concluded that a remedy more effective than a cease-and-desist order was required. And, following the teaching of this Court's opinion in

As two apparently disinterested authorities have noted:

By 1945, the closed shop had become one of the basic features of industrial relations in the building industry. This situation has largely remained true in practice up to the present time, despite the passage of legislation in 1947 prohibiting this type of provision from being included in collective agreements.

In all of the strongly unionized areas studied during the summer of 1952, employment arrangements equivalent to those under a closed shop were in effect. Membership in the union was almost universally regarded as a prerequisite for obtaining employment. In most instances men were employed directly or indirectly through the union itself. Both parties viewed this as standard practice and showed little or no concern for the illegality of the arrangement. (Haber and Levinson, *Labor Relations and Productivity in the Building Trades* (Univ. of Michigan, 1956), pp. 62, 74. (Emphasis added).)

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Virginia & Electric Power Co. v. Labor Board, 319 U. S. 533, the Board decided that an appropriate additional remedy would be to require that the moneys paid to the union under the illegal arrangement be refunded to the employees, and it accordingly so held in 1956 in *United Association of Journeymen, etc., and Brown-Olds Plumbing & Heating Corp.*, 115 N. L. R. B. 594.²

In *Virginia Electric & Power Co. v. Labor Board*, *supra*, this Court had upheld an identical remedy as within the Board's power. There an employer had committed an unfair labor practice by dominating a plant union in violation of § 8 (1), (2) and (3) of the Act. In fashioning a remedy that it deemed necessary to effectuate the policies of the Act, the Board ordered the employer not only to cease the practice but also to reimburse its employees for the dues withheld from their wages, pursuant to their signed authorizations, and paid

² The Board there stated:

[T]he Taft-Hartley amendments have made unlawful all closed-shop contracts as contrary to public policy, proscribing such conduct by unions as unfair labor practices. The dues required and collected under such a contract . . . contravene that public policy. It is no longer required by the Act that the union be company-dominated in order for collection of dues to be unlawful under a closed-shop contract. Here, the dues and assessments were required and collected pursuant to a contract which clearly contravened the public policy of the Act. Dues and assessments here collected constituted the price these employees paid in order to retain their jobs. We therefore conclude that the remedy of reimbursement of all such monies is appropriate and necessary to expunge the illegal effects of the unfair labor practices found here.

It is our view that, where payment of dues is required under a closed-shop contract, as where assessments are required under an otherwise valid agreement, reimbursement of such monies actually collected will best effectuate the policies of the Act. Otherwise the very fruits of the unfair labor practice itself will remain in the hands of the respondent.

115 N. L. R. B. at 600-601.

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to the union. Rejecting the employer's contention that this remedy was in excess of the Board's power, this Court said:

"[T]he Board has wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without back pay. *Phelps Dodge Corp. v. Labor Board*, 313 U. S. 177, 187-89. The particular means by which the effects of unfair labor practices are to be expunged are matters for the Board not the courts to determine. *I. A. of M. v. Labor Board*, *supra*, at p. 82; *Labor Board v. Link-Belt Co.*, *supra*, at p. 600. Here the Board, in the exercise of its informed discretion, has expressly determined that reimbursement in full of the checked-off dues is necessary to effectuate the policies of the Act. We give considerable weight to that administrative determination. It should stand unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act. There is no such showing here." 319 U. S., at 539-540.

Such an order, said the Court, "returns to the employees what has been taken from them" and restores to them "that truly unfettered freedom of choice which the Act demands." 319 U. S., at 541. Surely, it is as correct to say here, as it was there, that "An order such as this, which deprives [a union] of advantages accruing from a particular method of subverting the Act, is a permissible method of effectuating the statutory policy," *ibid.*, and that is all the order here purports to do.

It is argued that the *Virginia* case is distinguishable on the ground that it dealt with an employer-dominated union. But the question is one of power. The fact that

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the unfair labor practice there was by the employer rather than by the union, as here, is not a distinguishing difference. Nor does the fact that employees' rights were there infringed by a violation of §§ 8 (1), (2) and (3) of the Act, whereas they are here infringed by a violation of §§ 8 (b)(1)(A) and 8 (b)(2) of the Act, make any difference. In each instance the violation constituted an unfair labor practice, and the question is whether, in fashioning a remedy to effectuate the policies of the Act, the Board has power, in its informed discretion, to order reimbursement of the dues paid under the illegal arrangement. It would seem that if the Board had power so to order in the *Virginia* case, as this Court held, it similarly has power so to order in this case. Nothing in the *Virginia* case appears to limit the Board's power of restitution to cases involving employer-dominated unions or to any other particular type of violation, but the power seems clearly enough to be invocable in any appropriate case, in the informed discretion of the Board, and such has been the understanding of the courts.³

The contentions that such an order of restitution is beyond the Board's power because the employees received some benefits from the union, despite the illegal hiring arrangement, and that to allow restitution of the dues collected by the union under the illegal arrangement would be to enforce a "penalty" which the Board has no power to assess, were fully answered to the contrary in the *Virginia* case, 319 U. S., at 542-543.

To require specific proof of individual injury to all employees "would impose impossible administrative burdens." *Labor Board v. Revere Metal Art Co.*, *supra*.

³ *Labor Board v. Revere Metal Art Co.*, 280 F. 2d 96, 101 (C. A. 2d Cir.); *Labor Board v. Local 294, International Brotherhood of Teamsters*, 279 F. 2d 83, 86-88 (C. A. 2d Cir.); *Paul M. O'Neill v. Labor Board*, 46 L. R. M. 2503 (C. A. 3d Cir.); *Dixie Bedding Co. v. Labor Board*, 268 F. 2d 904, 907 (C. A. 5th Cir.).

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at 101, and prevent effective enforcement of the Act. Hence that character and fullness of proof is not required. See *Radio Officers Union v. Labor Board*, 347 U. S. 17, 48-52. And inasmuch as the General Counsel of the Board may issue complaints only upon charges filed with him, *id.*, at 53, and the Board's experience seems to have proved that only a few employees will be sufficiently daring and determined overtly to complain regardless of the nature of the violation, it would seem that the Board, in the exercise of its informed discretion, may reasonably conclude, even in the absence of specific proof of injury to all the employees, that full restitution of the dues collected by the union under an illegal arrangement is necessary to effectuate the policies of the Act.

For these reasons, I think the Board acted within its power in ordering restitution of the dues collected under the admittedly illegal arrangement here, that the Court of Appeals correctly enforced the order, and that its judgment should be affirmed.